UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

September 30, 2021

VIA United Parcel Service

Jay R. Langenbahn, Esquire
Lindhorst & Dreidame Co., L.P.A.
312 Walnut Street, Suite 3100
Cincinnati, OH 45202-4048

Re: In the Matter of TWDS, Inc., a/k/a My Last Bath, Windows Direct of Cincinnati, d/b/a Windows Direct USA of Cincinnati, and Windows Direct, Docket No. TSCA-05-2021-0013

Dear Mr. Langenbahn:

Enclosed please find the Complaint filed by the U.S. Environmental Protection Agency in the matter of TWDS, Inc., a/k/a My Last Bath, Windows Direct of Cincinnati, d/b/a Windows Direct USA of Cincinnati, and Windows Direct under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a), with accompanying copies of (1) the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, (2) the *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair, and Painting Rule; Lead-Based Paint Activities Rule*, (3) the *Section 1018 —Disclosure Rule Enforcement Response and Penalty Policy*, (4) the September 16, 2021 Standing Order *Designation of EPA Region 5 Electronic Filing System in Proceedings Governed by the Consolidated Rules*, and (5) the September 16, 2021 Standing Order *Authorization of Service by Email of Documents, except Complaints, Filed by Parties in Proceedings Governed by the Consolidated Rules*.

As provided in the Complaint, if you would like to request a hearing, you must file an answer to the Complaint in which you specifically request a hearing. Please note that if you do not file an answer with the Regional Hearing Clerk by mail at U.S. EPA, Region 5, 77 West Jackson Boulevard, Mail Code E-19J, Chicago, Illinois 60604, or electronically at r5hearingclerk@epa.gov within 30 days after receiving the Complaint, EPA may seek a default order assessing the proposed penalty and the assessed penalty would be due 30 days after the order becomes final. If you choose to file an answer, you also must mail a copy of it to Mary McAuliffe, Associate Regional Counsel, electronically at mcauliffe.mary@epa.gov, or to U.S. EPA, 77 West Jackson Boulevard, Mail Code C-14J, Chicago, Illinois 60604.

Whether or not you request a hearing, you may request an informal settlement conference. If you would like to request a conference, or if you have any questions about this matter, please

contact Mary McAuliffe, Associate Regional Counsel Regional Counsel, at mcauliffe.mary@epa.gov or (312) 886-6237.

Sincerely,

Harris, Michael

Digitally signed by Harris, Michael
Date: 2021.09.29 15:52:07 -05'00'

Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division

Enclosures

cc: Regional Hearing Clerk
r5hearingclerk@epa.gov

Ann L. Coyle
Regional Judicial Officer
coyle.ann@epa.gov

Raymond C. Carey (via UPS)
Registered Agent for TWDS, Inc.

Marci Bein (via UPS)
TWDS, Inc.

TWDS, INC. (via UPS)
Registered Agent for Windows Direct of Cincinnati

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No. TSCA-05-2021-0013**
	)	
TWDS, Inc., a/k/a My Last Bath, Windows Direct of Cincinnati, d/b/a Windows Direct USA of Cincinnati, and Windows Direct,	)	**Proceeding to Assess a Civil Penalty Under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a)**
	)	
Cincinnati, Ohio	)	
	)	
Respondent.	)	
	)	

Complaint

1. This is an administrative proceeding to assess a civil penalty under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a).

2. The Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency (EPA), Region 5.

3. Respondent is TWDS, Inc., a/k/a My Last Bath, Windows Direct of Cincinnati, d/b/a Windows Direct USA of Cincinnati, and Windows Direct, with its principal office located at 11258 Cornell Park Drive, Ste. 612, Cincinnati, Ohio 45242.

Statutory and Regulatory Background

4. In promulgating the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X), Pub. L. 102-550, 106 Stat. 3897 (codified in sections of 15 U.S.C. and 42 U.S.C.), Congress found, among other things, that low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under the age of 6; at low levels, lead poisoning in children causes intelligence deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems; and the

ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children. A key component of the national strategy to reduce and eliminate the threat of childhood lead poisoning is to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards.

5. Section 1021 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 amended TSCA, 15 U.S.C. § 2601 *et seq*., by adding Subchapter IV – Lead Exposure Reduction, 15 U.S.C. §§ 2681 through 2692.

6. Section 11(a) and (b) of TSCA, 15 U.S.C. § 2610(a) and (b), provides EPA with authority to conduct inspections upon the presentation of appropriate credentials and a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected.

7. Section 11(c) of TSCA, 15 U.S.C. § 2610(c), authorizes the EPA Administrator to require that witnesses answer questions and provide reports, papers, documents, and other information to carry out the purposes of TSCA.

8. Section 402(a) of TSCA, 15 U.S.C. § 2682(a), required the Administrator of EPA to promulgate regulations to ensure that individuals engaged in lead-based paint activities are properly trained; that training programs are accredited; that contractors engaged in such activities are certified; and that such regulations contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety.

9. Section 402(c) of TSCA, 15 U.S.C. § 2682(c), required the Administrator of EPA to promulgate guidelines for the conduct of renovation and remodeling activities to reduce the risk of exposure to lead in connection with renovation and remodeling of target housing, public buildings built before 1978, and commercial buildings, and to revise the regulations under

Section 402(a) of TSCA to apply those regulations to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.

10. Section 406(b) of TSCA, 15 U.S.C. § 2686(b), required the Administrator of EPA to promulgate regulations to require each person who performs for compensation a renovation of target housing to provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation.

11. Section 407 of TSCA, 15 U.S.C. § 2687, required the regulations promulgated by the Administrator under Subchapter IV to include such recordkeeping and reporting requirements as may be necessary to insure the effective implementation of the TSCA Lead Exposure Reduction requirements, 15 U.S.C. §§ 2681-2692.

12. Under Section 409 of TSCA, 15 U.S.C. § 2689, it shall be unlawful for any person to fail or refuse to comply with any rule or order issued under Subchapter IV – Lead Exposure Reduction, 15 U.S.C. §§ 2681 through 2692. *See also* 40 C.F.R. § 754.87.

13. Under Section 15 of TSCA, 15 U.S.C. § 2614, it shall be unlawful for any person to fail or refuse to establish and maintain records, submit reports, notices, or other information, or permit access to or copying of records, as required by TSCA or a rule thereunder. *See also* 40 C.F.R. § 745.87.

14. Under Sections 402, 406, and 407 of TSCA, 15 U.S.C. §§ 2682, 2686, and 2687, EPA promulgated the residential property renovation regulations at 40 C.F.R. Part 745, Subpart E, prescribing procedures and requirements for: the accreditation of renovator training programs; certification of individuals and firms; work practice standards for renovation, repair

and painting activities in target housing and child-occupied facilities; and recordkeeping to demonstrate compliance with work practice standards. 73 *Fed. Reg*. 21691 (April 22, 2008).

15. 40 C.F.R. Part 745, Subpart E, Residential Property Renovation, applies to all renovations performed for compensation in target housing and child-occupied facilities on or after April 28, 2010, with exceptions not relevant here. 40 C.F.R. § 745.82.

16. 40 C.F.R. § 745.83 defines *firm* to mean 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.

17. 40 C.F.R. § 745.83 defines *pamphlet* to mean the EPA pamphlet titled Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools developed under Section 406(a) of TSCA for use in complying with Section 406(b) of TSCA, or any State or Tribal pamphlet approved by EPA pursuant to 40 C.F.R. § 745.326 that is developed for the same purpose. This includes reproductions of the pamphlet when copied in full and without revisions or deletion of material from the pamphlet (except for the addition or revision of State or local sources of information).

18. 40 C.F.R. § 745.83 defines *person* as any natural or judicial person including any individual, corporation, partnership, or association.

19. 40 C.F.R. § 745.83 defines *renovation* to mean 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 this part (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. A renovation performed for the purpose of

converting a building, or part of a building, into target housingor a child-occupied facility is a renovation under this subpart. The term renovation does not include minor repair and maintenance activities.

20. 40 C.F.R. § 745.83 defines *renovator* to mean an individual who either performs or directs workers who perform renovations. A certified renovator is a renovator who has successfully completed a renovator course accredited by EPA or an EPA authorized State or Tribal Program.

21. 40 C.F.R. § 745.83 defines *minor repair and maintenance activities* as activities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by §745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed. Jobs, other than emergency renovations, performed in the same room within the same 30 days must be considered the same job for the purpose of determining whether the job is a minor repair and maintenance activity.

22. TSCA Section 401(17), 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103, define *target housing* to mean any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six (6) years of age resides or is expected to reside in such housing) or any zero-bedroom dwelling.

23. 40 C.F.R. Part 745, Subpart E, Residential Property Renovation, applies to all renovations performed for compensation in target housing and child-occupied facilities, with exceptions not relevant here. 40 C.F.R. § 745.82.

24. 40 C.F.R. § 745.84(a)(2) requires that the firm performing the renovation in target housing must provide the adult occupant, if the owner does not occupy the dwelling unit, with the pamphlet no more than 60 days before beginning renovation activities, and obtain from the owner a written acknowledgement that the owner has received the pamphlet or obtain a certification of mailing at least seven days prior to the renovation.

25. 40 C.F.R. § 745.85(a) requires that renovations must be performed by certified firms, in accordance with 40 C.F.R. § 745.89, using certified renovators in accordance with 40 C.F.R. § 745.90.

26. 40 C.F.R. § 745.86(a) requires firms performing renovations to retain and, if requested, make available to EPA all records necessary to demonstrate compliance with 40 C.F.R. Part 745, Subpart E for a period of three years following completion of the renovation.

27. 40 C.F.R. § 745.86(b)(6) requires firms to retain records that document compliance with the work practice standards in 40 C.F.R. § 745.85, including documentation that a certified renovator was assigned to the project, that the certified renovator provided on-the-job training for workers used on the project, that the certified renovator performed or directed workers who performed all of the tasks described in § 745.85(a), that the certified renovator performed the post-renovation cleaning verification described in § 745.85(b). If the renovation firm was unable to comply with all of the requirements of this rule due to an emergency as defined in § 745.82, the firm must document the nature of the emergency and the provisions of the rule that were not

followed. This documentation must include a copy of the certified renovator's training certificate, and a certification by the certified renovator assigned to the project.

28. 40 C.F.R. § 745.87(c) requires firms performing renovations to establish and maintain records and make them available to EPA or permit access to or copying of records.

29. 40 C.F.R. § 745.89(d)(1) requires firms performing renovations in target housing to ensure that all individuals performing the renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator in accordance with § 745.90.

30. Under 15 U.S.C. § 2689 and 40 C.F.R. § 745.87(a), failing to comply with any requirement of 40 C.F.R. Part 745, Subpart E, violates Section 409 of TSCA, 15 U.S.C. § 2689, which may subject the violator to administrative penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a) and 40 C.F.R. § 745.87(d).

31. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), 40 C.F.R. § 745.87(d), and 40 C.F.R. Part 19, authorize the Administrator of EPA to assess a civil penalty of up to $41,056 per violation for each day of violation of Sections 15 and 409 of TSCA that occurred after November 2, 2015, and assessed on or after December 23, 2020.

General Allegations

32. Complainant incorporates paragraphs 1 through 31 of this Complaint as if set forth in this paragraph.

33. At all times relevant to this Complaint, Respondent is a corporation registered in Kentucky, and doing business in Ohio.

34. At all times relevant to this Complaint, Respondent's corporation was both a "person" and a "firm" as those terms are defined by 40 C.F.R. § 745.83.

35. EPA received a tip/complaint regarding Windows Direct USA's compliance with

Sections 406 and 407 of TSCA.

36. On October 7, 2019, an authorized EPA representative arrived at Respondent's place of business, and presented his federal inspector credentials and a written notice of inspection to monitor Respondent's compliance with Sections 406 and 407 of TSCA.

37. On October 7, 2019, Respondent's representative Chris Carey did not permit the authorized EPA representative access to review or copy records necessary for Respondent to demonstrate compliance with 40 C.F.R. Part 745, Subpart E, and Section 407 of TSCA.

38. On October 10, 2019, Complainant issued an administrative subpoena to Respondent, under authority of Section 11 of TSCA, 15 U.S.C. § 2610 (TSCA Subpoena), seeking, among other things, a copy of the renovator certification showing completion of an EPA accredited training course, a copy of the firm certification received by EPA, copies of all contracts and/or agreements for renovation (contracts) and copies of all acknowledgements of receipt of a pamphlet by the owners and occupants of residential housing for all projects performed from October 7, 2016 to October 7, 2019.

39. By letter dated November 6, 2019, Complainant agreed to narrow the scope of documents required by the TSCA Subpoena by asking Respondent to submit an initial list of all projects responsive to the TSCA Subpoena.

40. On November 13, 2019, Respondent provided Complainant with a list of approximately 2,020 projects performed during the period of time set forth in EPA's TSCA Subpoena (October 7, 2016 to October 7, 2019).

41. On November 29, 2019, Complainant modified the scope of the TSCA Subpoena to require documents responsive to EPA's TSCA Subpoena for 34 of the approximately 2,015 projects provided by Respondent on November 13, 2019.

42. On January 28, 2020, Respondent provided Complainant with documents for 34 projects responsive to the TSCA Subpoena.

43. At each of the 18 addresses listed in TABLE 1, below, Respondent performed, or directed workers to perform for compensation, the work described under "Project Description":

TABLE 1

Line No.	Residential Property Address	Residence Type	Built Year	Work Contract Date	Project Description
1	850 Old Ludlow Ave, Cincinnati OH 45220	Single Family	1921	8/21/2019	Replace Windows
2	1753 Wickham Place, Cincinnati, OH 45214	Single Family	1926	11/1/2016	Replace Windows and Doors
3	705 Carlisle Ave, Hamilton, OH 45013	Single Family	1961	3/20/2018	Replace Windows and Doors
4	2022 Grand Ave, Middletown, OH 45044	Single Family	1919	12/27/2017	Replace Windows
5	11391 Rose Lane, Cincinnati, OH 45246	Single Family	1956	3/16/2018	Replace Windows
6	6657 Kirkland Drive, Cincinnati, OH 45224	Single Family	1962	3/13/2018	Replace Windows
7	4334 Floral Ave, Cincinnati, OH 45212	Single Family	1900	10/25/2016	Replace Windows
8	4317 Ashland Ave, Cincinnati, OH 45212	Single Family	1905	10/27/2016	Replace Windows
9	646 Sutton Rd, Cincinnati, OH 45230	Single Family	1939	3/17/2017	Replace Windows
10	4001 Ivanhoe Ave, Norwood, OH 45212	Single Family	1910	10/28/2017	Replace Windows
11	2421 Vera Ave, Cincinnati, OH 45237	Multi-Family	1949	2/26/2018	Replace Windows
12	3426 Wabash Ave, Cincinnati, OH 45207	Single Family	1925	4/18/2018	Replace Windows
13	113 Glenwood Ave, Cincinnati, OH 45217	Multi-Family	1946	8/7/2018	Replace Windows
14	939 Tiffin Ave, Hamilton, OH 45015	Single Family	1923	3/13/2019	Replace Windows
15	2607 Harrison Ave, Cincinnati, OH 45211	Single Family	1925	10/13/2017	Replace Windows
16	1122 Omena Place,	Single	1926	6/24/2019	Replace Windows

	Cincinnati, OH 45230	Family			
17	535 Central Ave, Hamilton, OH 45011	Single Family	1879	10/22/2016	Replace Windows
18	7995 Nieman Dr, Cincinnati, OH 45224	Single Family	1960	Not Dated	Replace Doors

44. At each of the 18 addresses listed in paragraph 43, Respondent entered into a contract to perform work on the dates specified for each Work Contract Date.

45. At each of the 18 addresses listed in paragraph 43, Respondent performed or directed performance of modifications of the buildings' existing structures that resulted in disturbance of painted surfaces.

46. At each of the 18 addresses listed in paragraph 43, Respondent performed or directed performance of a renovation as defined in 40 C.F.R. § 745.83.

47. At each of the 18 addresses listed in paragraph 43, Respondent performed or directed performance of work at residential housing built prior to 1978.

48. Each of the residential properties at the 18 addresses listed in paragraph 43 was constructed prior to 1978, and therefore each residential housing is "target housing" as defined in 40 C.F.R. § 745.103.

Count 1 – Failure or Refusal to Permit the EPA Representative Entry or Inspection

49. Complainant incorporates paragraphs 1 through 48 of this Complaint as if set forth in this paragraph.

50. On October 7, 2019, Respondent's representative refused to permit an EPA representative access to review or copy records necessary for Respondent to demonstrate compliance as required by 40 C.F.R. Part 745, Subpart E and Section 407 of TSCA during an inspection.

51. Respondent's failure or refusal to permit the EPA representative access to review or copy records necessary for Respondent to demonstrate compliance as required by 40 C.F.R. Part 745, Subpart E and Section 407 of TSCA, constitutes a violation under 40 C.F.R. § 745.87(c) and Sections 11 and 15 of TSCA, 15 U.S.C. §§ 2610 and 2689.

Count 2 – Failure to Obtain Firm Certification

52. Complainant incorporates paragraphs 1 through 48 of this Complaint as if set forth in this paragraph.

53. 40 C.F.R. §§ 745.89(a) and 745.82(a)(2)(ii) require firms that perform, offer, or claim to perform renovations for compensation to obtain firm certification under EPA.

54. Respondent was not registered as a certified firm under EPA at the time of the 18 renovations described in paragraph 43, and did not qualify for an exemption under 40 C.F.R. § 745.82(b).

55. Respondent's failure to be registered as a certified firm before performing each of the 18 renovations described in paragraph 43 constitutes a violation under 40 C.F.R. § 745.89(a) and 40 C.F.R. § 745.81(a)(2)(ii), and 15 U.S.C. § 2689.

Counts 3 and 4 – Failure to Obtain Written Ackowledgement From Adult Occupants of Two Multi-Family Dwellings

56. Complainant incorporates paragraphs 1 through 48 of this Complaint as if set forth in this paragraph.

57. Respondent performed or directed performance of renovations in two locations of multi-family target housing, described in paragraph 43 in the Table at Line Nos. 3 and 13, and, failed to obtain from each adult occupant the written acknowledgment that each occupant had

received the pamphlet, or obtain for each location a certificate of mailing at least seven days prior to each renovation.

58. Respondent's failure to obtain from each adult occupant of the four locations of multi-family target housing, as described in paragraph 43 in the Table at Line Nos. 3 and 13, the written acknowledgement that each occupant had received the pamphlet, or obtain a certificate of mailing at least seven days prior to each renovation, constitutes two violations of 40 C.F.R. § 745.84(a)(2)(i), 40 C.F.R. § 745.87(a), and 15 U.S.C. § 2689.

Counts 5, 6 and 7 – Failure to Ensure that all Individuals Working on Behalf of the Firm are either Certified Renovators or Trained by a Certified Renovator

59. Complainant incorporates paragraphs 1 through 48 of this Complaint as if set forth in this paragraph.

60. 40 C.F.R. § 745.81(a)(3) provides that on or after April 22, 2010, all renovations must be directed by renovators certified in accordance with 40 C.F.R. § 745.90(a) and performed by certified renovators or individuals trained in accordance with 40 C.F.R. § 745.90(b)(2) in target housing or child-occupied facilities

61. Respondent performed or directed performance of renovations in three locations of single-family target housing, described in paragraph 43 in the Table at Line Nos. 3, 7 and 15, and failed to ensure that all individuals working on behalf of the firm were either certified renovators or had been trained by a certified renovator in accordance with 40 C.F.R. § 745.90.

62. Respondent's failure to ensure that all individuals working on behalf of the firm were either certified renovators or had been trained by a certified renovator in accordance with 40 C.F.R. § 745.90, constitutes three violations of 40 C.F.R. § 745.89(d)(1), 40 C.F.R. § 745.87(a), and 15 U.S.C. § 2689.

Counts 8 to 13 – Failure to Retain All Records Necessary to Demonstrate Compliance with 40 C.F.R. Part 745, Subpart E

63. Complainant incorporates paragraphs 1 through 48 of this Complaint as if set forth in this paragraph.

64. In six contracted renovations described in paragraph 43 in the Table at Line Nos. 1, 2, 3, 7, 15, and 17, Respondent failed to retain the records necessary to demonstrate compliance with 40 C.F.R. Part 745, Subpart E for a period of three years following completion of the six contracted renovations as follows:

a. Failure to retain documentation that the certified renovator performed the post-renovation cleaning verification described in 40 C.F.R. § 745.85(b), for the contracted renovations referenced in Line Nos. 1, 2, and 17; and,

b. Failure to retain and provide a copy of the assigned certified renovator's training certificate, for contracted renovations referenced in Line Nos. 3, 7, and 15.

65. Respondent's failure to retain all records necessary to demonstrate compliance with 40 C.F.R. Part 745, Subpart E for a period of three years following the completion of six contracted renovations referenced in paragraph 43 in the Table at Line Nos. 1 to 3, 7, 15, and 17, constitutes 6 violations of 40 C.F.R. § 745.86(b)(6), 40 C.F.R. § 745.87(a), and 15 U.S.C. § 2689.

66. On September 2, 2020, EPA advised Respondent by letter that EPA was planning to file a civil administrative complaint against Respondent for specific alleged violations of the Residential Property Renovation Rule and that the complaint would seek a civil penalty. EPA asked Respondent to identify any factors Respondent thought EPA should consider before

issuing the complaint. EPA asked Respondent to submit specific financial documents if Respondent believed there were financial factors which bore on Respondent's ability to pay a civil penalty,.

67. On September 23, 2020, Respondent received the letter referred to in paragraph 66, above.

68. From September 23, 2020 to August 19, 2021, Respondent submitted information related to the alleged violations.

69. Respondent has not provided any financial documents related to its ability to pay the proposed penalty.

Proposed Civil Penalty

70. Complainant proposes that the Administrator assess a civil penalty against Respondent for the violations alleged in this Complaint as follows:

Count 1

40 C.F.R. § 745.87(c)……..$6,000

Count 2

40 C.F.R. § 745.82(a)(1)(ii) and 40 C.F.R. § 745.89(a)…….$22,500

Counts 3 and 4

40 C.F.R. § 745.84(a)(2)…….$6,440

Counts 5, 6 and 7

40 C.F.R. § 745.89(d)(1)…….$45,900

Counts 8 to 13

40 C.F.R. § 745.86(b)(6)…….$12,240

Inflation Adjustment

Inflation Adjustment ……...……...…….$ 11,292

Total Proposed Civil Penalty……$ 104,372

71. Respondent has an ability to pay a penalty of $104,372.

72. In determining the amount of any civil penalty, Section 16 of TSCA requires EPA to take into account the nature, circumstances, extent and gravity of the violation or violations alleged 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 factors as justice may require.

73. EPA calculates penalties by applying its *Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* dated August 19, 2010 (Response Policy), the *Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy* dated December 2007 (ERPP), and the appropriate *Adjustment of Civil Monetary Penalties for Inflation*, pursuant to 40 C.F.R. Part 19, and the applicable EPA memoranda addressing EPA's civil penalty policies to account for inflation. The Response Policy and ERPP provide a rational, consistent and equitable calculation methodology for applying the statutory factors to particular cases. As discussed in the Response Policy, the severity of each violation alleged in the complaint is based on the extent to which each violation impairs the ability of a lessee to assess information regarding hazards associated with lead-based paint, and precludes the lessee from making a fully informed decision whether to lease the housing or take appropriate measures to protect against lead-based paint hazards. Factors relevant to assessing an appropriate penalty include information pertaining to a Respondent's ability to pay a penalty, any evidence showing that no

lead-based paint exists in the cited housing, and any evidence that Respondent has taken steps to discover the presence of and/or has taken steps to abate lead-based paint and its hazards in subject housing.

Rules Governing This Proceeding

The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) at 40 C.F.R. Part 22 govern this proceeding to assess a civil penalty. Attached to the Complaint is a copy of the Consolidated Rules.

Filing and Service of Documents

Respondent must file with the Regional Hearing Clerk the original and one copy of each document Respondent intends to include as part of the record in this proceeding. The Regional Hearing Clerk's address using one of the following methods:

Electronically:
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 5
r5hearingclerk@epa.gov

By mail:
Regional Hearing Clerk (EC-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

The attached September 16, 2020 Standing Order from U.S. Environmental Protection Agency, Region 5 authorizes electronic service of certain Part 22 documents, including the Respondent's Answer to this Complaint. The Regional Judicial Officer (RJO) and Presiding Officer of EPA, Region 5, has designated EPA's Microsoft Outlook-based email system to serve as EPA Region 5's electronic filing system (EFS) for documents filed with the Regional Hearing

Clerk in connection with administrative enforcement actions under the Consolidated Rules. The Standing Order does not require that documents be filed using this EFS; rather, it authorizes the use of the email EFS as an option, in addition to the methods already authorized by the Consolidated Rules.

Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Mary McAuliffe to receive any answer and subsequent legal documents that Respondent serves in this proceeding. A copy of each document must be sent:

Electronically:
Mary McAuliffe
Associate Regional Counsel
U.S. EPA, Region 5
mcauliffe.mary@epa.gov

By mail:
Mary McAuliffe (C-14J)
Associate Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

You may telephone Ms. McAuliffe at (312) 886-6237.

Penalty Payment

Respondent may resolve this proceeding at any time by paying the proposed penalty by certified or cashier's check payable to "Treasurer, United States of America" and by delivering the check to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondent simultaneously must send copies of the check and transmittal letter to Ms. McAuliffe and to:

Electronically:
Christina Saldivar
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
saldivar.christina@epa.gov

By mail:
Christina Saldivar (ECP-17J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Answer and Opportunity to Request a Hearing

If Respondent contests any material fact upon which the Complaint is based or the appropriateness of any penalty amount, or contends that he is entitled to judgment as a matter of law, Respondent may request a hearing before an Administrative Law Judge. To request a hearing, Respondent must file a written Answer within 30 days of receiving this Complaint and must include in that written Answer a request for a hearing. Any hearing will be conducted according to the Consolidated Rules.

In counting the 30-day time period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

To file an answer, Respondent must file the original written answer and one copy with the Regional Hearing Clerk at the address specified above.

Respondent's written answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that he has no knowledge of a particular factual allegation, the allegation is deemed denied. Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation. Respondent's answer must also state:

a. The circumstances or arguments which Respondent alleges constitute grounds of defense;
b. The facts that Respondent disputes;
c. The basis for opposing the proposed penalty; and
d. Whether Respondent requests a hearing.

If Respondent does not file a written answer within 30 calendar days after receiving this Complaint, the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes the final order of the Administrator of EPA under Section 22.27(c) of the Consolidated Rules.

Settlement Conference

Whether or not Respondent requests a hearing, Respondent may request an informal settlement conference to discuss the facts of this proceeding and to arrive at a settlement. To request an informal settlement conference, Respondent may contact Christina Saldivar at the address provided above.

Respondent's request for an informal settlement conference does not extend the 30-calendar-day period for filing a written Answer to this Complaint. Respondent may pursue simultaneously the informal settlement conference and the adjudicatory hearing process. The Complainant encourages all parties facing civil penalties to pursue settlement through an informal conference. The Complainant, however, will not reduce the penalty simply because the parties hold an informal settlement conference.

Continuing Obligation to Comply

Respondent's payment of the civil penalty will not satisfy Respondent's legal obligation to comply with TSCA and any other applicable federal, state, or local law.

Consent Agreement and Final Order

EPA has authority, where appropriate, to modify the amount of the proposed penalty to reflect any settlement reached with Respondent in an informal conference. The terms of the settlement would be embodied in a Consent Agreement and Final Order. A Consent Agreement signed by both parties is binding when the Regional Administrator signs the Final Order and it is filed with the Regional Hearing Clerk.

9/29/2021
Date

Harris, Michael Digitally signed by Harris, Michael Date: 2021.09.29 15:56:32 -05'00'

Michael D. Harris
Division Director
Enforcement and Compliance Assurance Division

ATTACHMENT 1

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Subpart B—Parties and Appearances

Subpart C—Prehearing Procedures

Subpart D—Hearing Procedures

Subpart E—Initial Decision, Motion To Reopen a Hearing, and Motion To Set Aside a Default Order

Subpart F—Appeals and Administrative Review

Subpart G—Final Order

Subpart H—Supplemental Rules

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

AUTHORITY: 7 U.S.C. 1361; 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (''EPCRA'') (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g–3(g)(3)(B), 300h–2(c), and 300j–6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(11) The assessment of any administrative civil penalty under section 1908(b) of the Act To Prevent Pollution From Ships (''APPS''), as amended (33 U.S.C. 1908(b)).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000; 79 FR 65900, Nov. 6, 2014; 81 FR 73970, Oct. 25, 2016]

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means an individual duly authorized to serve as Clerk of the Environmental Appeals Board.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(2) Provides the Regional Hearing Clerk with a return address.

Complainant means any person authorized to issue a complaint in accordance with §§ 22.13 and 22.14 on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be a member of the Environmental Appeals Board, the Regional Judicial Officer or any other person who will participate or advise in the adjudication.

Consolidated Rules of Practice means the regulations in this part.

Environmental Appeals Board means the Board within the Agency described in 40 CFR 1.25.

Final order means:

(1) An order issued by the Environmental Appeals Board or the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of the matter in controversy between the parties;

(2) An initial decision which becomes a final order under § 22.27(c); or

(3) A final order issued in accordance with § 22.18.

Hearing means an evidentiary hearing on the record, open to the public (to the extent consistent with § 22.22(a)(2)), conducted as part of a proceeding under these Consolidated Rules of Practice.

Hearing Clerk means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Initial decision means the decision issued by the Presiding Officer pursuant to §§ 22.17(c), 22.20(b) or 22.27 resolving all outstanding issues in the proceeding.

Party means any person that participates in a proceeding as complainant, respondent, or intervenor.

Permit action means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act (33 U.S.C. 1412) or termination under section 402(a) of the Clean Water Act (33 U.S.C. 1342(a)) or section 3005(d) of the Solid Waste Disposal Act (42 U.S.C. 6925(d)).

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed. The Presiding Officer shall be an Administrative Law Judge, except where §§ 22.4(b), 22.16(c) or 22.51 allow a Regional Judicial Officer to serve as Presiding Officer.

Proceeding means the entirety of a single administrative adjudication, from the filing of the complaint through the issuance of a final order, including any action on a motion to reconsider under § 22.32.

Regional Administrator means, for a case initiated in an EPA Regional Office, the Regional Administrator for that Region or any officer or employee thereof to whom his authority is duly delegated.

Regional Hearing Clerk means an individual duly authorized to serve as hearing clerk for a given region, who shall be neutral in every proceeding. Correspondence with the Regional Hearing Clerk shall be addressed to the Regional Hearing Clerk at the address specified in the complaint. For a case initiated at EPA Headquarters, the term Regional Hearing Clerk means the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.4(b).

Respondent means any person against whom the complaint states a claim for relief.

(b) Terms defined in the Act and not defined in these Consolidated Rules of Practice are used consistent with the meanings given in the Act.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000; 79 FR 65901, Nov. 6, 2014]

§ 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

(a) *Environmental Appeals Board.* (1) The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice, and approves settlement of proceedings under these Consolidated Rules of Practice commenced at EPA Headquarters. The Environmental Appeals Board may refer any case or motion to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

(2) In exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding, including imposing procedural sanctions against a party who without adequate justification fails or refuses to comply with these Consolidated Rules of Practice or with an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding.

(b) *Regional Judicial Officer.* Each Regional Administrator shall delegate to one or more Regional Judicial Officers authority to act as Presiding Officer in proceedings under subpart I of this part, and to act as Presiding Officer until the respondent files an answer in proceedings under these Consolidated Rules of Practice to which subpart I of this part does not apply. The Regional Administrator may also delegate to one or more Regional Judicial Officers the authority to approve settlement of proceedings pursuant to § 22.18(b)(3). These delegations will not prevent a Regional Judicial Officer from referring any motion or case to the Regional Administrator. A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or another Federal agency and who may perform other duties within the Agency. A Regional Judicial

Officer shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer. A Regional Judicial Officer shall not knowingly preside over a case involving any party concerning whom the Regional Judicial Officer performed any functions of prosecution or investigation within the 2 years preceding the commencement of the case. A Regional Judicial Officer shall not prosecute enforcement cases and shall not be supervised by any person who supervises the prosecution of enforcement cases, but may be supervised by the Regional Counsel.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer may:

(1) Conduct administrative hearings under these Consolidated Rules of Practice;

(2) Rule upon motions, requests, and offers of proof, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law

Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

§ 22.5 Filing, service by the parties, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. When a document is required to be filed with the Environmental Appeals Board, the document shall be sent to the Clerk of the Board by U.S. Mail, delivered by hand or courier (including delivery by U.S. Express Mail or by a commercial delivery service), or transmitted by the Environmental Appeal Board's electronic filing system, according to the procedures specified in 40 CFR 124.19 (i)(2)(i), (ii), and (iii). The Presiding Officer or the Environmental Appeals Board may by order authorize or require filing by facsimile or an electronic filing system, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* Unless the proceeding is before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on the Presiding Officer and on each party. In a proceeding before the Environmental Appeals Board, a copy of each document filed in the proceeding shall be served on each party.

(1) *Service of complaint.* (i) 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, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) 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.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All documents filed by a party

other than the complaint, rulings, orders, and decisions shall be served by the filing party on all other parties. Service may be made personally, by U.S. mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), by any reliable commercial delivery service, or by facsimile or other electronic means, including but not necessarily limited to email, if service by such electronic means is consented to in writing. A party who consents to service by facsimile or email must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the appropriate Clerk. In addition, the Presiding Officer or the Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, mailing address, telephone number, and email address of an individual authorized to receive service relating to the proceeding on behalf of the person. Parties shall promptly file any changes in this information with the Headquarters or Regional Hearing Clerk or the Clerk of the Board, as appropriate, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words ''Business Confidentiality Asserted''. The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any

party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

[64 FR 40176, July 23, 1999, as amended at 69 FR 77639, Dec. 28, 2004; 79 FR 65901, Nov. 6, 2014; 82 FR 2234, Jan. 9, 2017]

§ 22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Headquarters or Regional Hearing Clerk, as appropriate, in any manner allowed for the service of such documents. All rulings, orders, decisions, and other documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. The Clerk of the Board, the Headquarters Hearing Clerk, or the Regional Hearing Clerk, as appropriate, must serve copies of such rulings, orders, decisions and other documents on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).

[82 FR 2234, Jan. 9, 2017]

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Completion of service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing, when placed in the custody of a reliable commercial delivery service, or for facsimile or other electronic means, including but not necessarily limited to email, upon transmission. Where a document is served by U.S. mail, EPA internal mail, or commercial delivery service, including overnight or same-day delivery, 3 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document. The time allowed for the serving of a responsive document is not expanded by 3 days when the served document is served by personal delivery, facsimile, or other electronic means, including but not necessarily limited to email.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

§ 22.8 *Ex parte* discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum

or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part

shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, an Administrative Law Judge) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision becomes final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

[64 FR 40176, July 23, 1999, as amended at 82 FR 2234, Jan. 9, 2017]

§ 22.17 Default.

(a) *Default.* 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. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief

against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. 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. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any

specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act (''ADRA''), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in

the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer

shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality

and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term ''unavailable'' shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement

of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision, Motion To Reopen a Hearing, and Motion To Set Aside a Default Order

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing or to set aside a default order.

(a) *Motion to reopen a hearing*—(1) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: State briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by § 22.5(a)(1).

(2) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Headquarters or Regional Hearing Clerk, as appropriate, and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice. The timely filing of a motion to reopen a hearing shall automatically toll the running of the time periods for an initial decision becoming final under § 22.27(c), for appeal under § 22.30, and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to § 22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to reopen the hearing or an amended decision. The Presiding Officer may summarily deny subsequent motions to reopen a hearing filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

(b) *Motion to set aside default order*—(1) *Filing and content.* A motion to set aside a default order must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. The motion shall be made to the Presiding Officer and filed with the Headquarters or Regional Hearing

Clerk, as appropriate. A copy of the motion shall be filed with the Clerk of the Board in the manner prescribed by § 22.5(a)(1).

(2) *Effect of motion to set aside default.* The timely filing of a motion to set aside a default order automatically tolls the running of the time periods for an initial decision becoming final under § 22.27(c), for appeal under § 22.30(a), and for the Environmental Appeals Board to elect to review the initial decision on its own initiative pursuant to § 22.30(b). These time periods begin again in full when the Presiding Officer serves an order denying the motion to set aside or an amended decision. The Presiding Officer may summarily deny subsequent motions to set aside a default order filed by the same party if the Presiding Officer determines that the motion was filed to delay the finality of the decision.

[82 FR 2235, Jan. 9, 2017]

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal and appeal brief—*(1) *Filing an appeal—*(i) *Filing deadline and who may appeal.* Within 30 days after the initial decision is served, any party may file an appeal from any adverse order or ruling of the Presiding Officer.

(ii) *Filing requirements.* Appellant must file a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board as set forth in § 22.5(a). One copy of any document filed with the Clerk of the Board shall also be served on the Headquarters or Regional Hearing Clerk, as appropriate. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants.

(iii) *Content.* The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with appropriate page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (*e.g.*, by including the document name and page number)), argument on the issues presented, a short conclusion

stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If any appellant includes attachments to its notice of appeal or appellate brief, the notice of appeal or appellate brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record.

(iv) *Multiple appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal and accompanying appellate brief on any issue within 20 days after the date on which the first notice of appeal was served or within the time to appeal in paragraph (a)(1)(i) of this section, whichever period ends later.

(2) *Response brief.* Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to arguments raised by the appellant, together with specific citation or other appropriate reference to the record, initial decision, and opposing brief (*e.g.*, by including the document name and page number). Appellee shall simultaneously serve one copy of the response brief upon each party, non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. If any responding party or non-party participant includes attachments to its response brief, the response brief shall contain a table that provides the title of each appended document and assigns a label identifying where it may be found in the record. Further briefs may be filed only with leave of the Environmental Appeals Board.

(3) *Length*—(i) *Briefs.* Unless otherwise ordered by the Environmental Appeals Board, appellate and response briefs may not exceed 14,000 words, and all other briefs may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 30-page limit for appellate and response briefs, or a 15-page limit for replies. Headings, footnotes, and quotations count toward the word limitation. The table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of compliance with the word limitation, and any attachments do not count toward the word or page-length limitation. The Environmental Appeals Board may exclude any appeal, response, or other brief that does not meet word or page-length limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board to file a longer brief. Such requests are discouraged and will be granted only in unusual circumstances.

(ii) *Motions.* Unless otherwise ordered by the Environmental Appeals Board, motions and any responses or replies may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. As an alternative to this word limitation, filers may comply with a 15-page limit. Headings, footnotes, and quotations count toward the word or page-length limitation. The Environmental Appeals Board may exclude any motion that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board. Such requests are discouraged and will be granted only in unusual circumstances.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall issue an order notifying the parties and the Presiding Officer of its intent to review that decision. The Clerk of the Board shall serve the order upon the Regional Hearing Clerk, the Presiding Officer, and the parties within 45 days after the initial decision was served upon the parties. In that order or in a later order, the Environmental Appeals Board shall identify any issues to be briefed by the parties and establish a time schedule for filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of

the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties written notice of such determination to allow preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion in response to a request or on its own initiative, order oral argument on any or all issues in a proceeding. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument is necessary. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(e) *Motions on appeal*—(1) *General.* All motions made during the course of an appeal shall conform to § 22.16 unless otherwise provided. In advance of filing a motion, parties must attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and must indicate in the motion the attempt made and the response obtained.

(2) *Disposition of a motion for a procedural order.* The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.

(3) *Timing on motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003; 69 FR 77639, Dec. 28, 2004; 79 FR 65901, Nov. 6, 2014; 80 FR 13252, Mar. 13, 2015; 82 FR 2235, Jan. 9, 2017]

Subpart G—Final Order

§ 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the

check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§ 22.33 [Reserved]

§ 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)), and a determination of nonconforming engines, vehicles or equipment under sections 207(c) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7541(c) and 7547(d)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty or a final determination of nonconforming engines, vehicles or equipment, the person to whom the order or determination is to be issued shall be given written notice of the proposed issuance of the order or determination. Service of a complaint or a consent agreement and final order pursuant to § 22.13 satisfies these notice requirements.

[81 FR 73971, Oct. 25, 2016]

§ 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and

outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) (''SWDA''). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act (''CWA'')(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the ''EPA, Hazardous Substances Superfund,'' in the amount assessed, and noting the case title and docket

number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved]

§ 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act (''TSCA'') (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of

the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under § 122.64 or § 270.43 of this chapter during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in § 124.8 of this chapter;

(2) The Director (as defined in § 124.2 of this chapter) shall provide public notice of the complaint in accordance with § 124.10 of this chapter, and allow for public comment in accordance with § 124.11 of this chapter; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in § 124.9 of this chapter, and any public comments received.

[65 FR 30904, May 15, 2000]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District

Court, with coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

(ix) If judicial review of the final order is denied, the final order shall become effective 30 days after such denial has been filed with the Regional Hearing Clerk.

§§ 22.46–22.49 [Reserved]

Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

§ 22.50 Scope of this subpart.

(a) *Scope.* This subpart applies to all adjudicatory proceedings for:

(1) The assessment of a penalty under sections 309(g)(2)(A) and 311(b)(6)(B)(i) of the Clean Water Act (33 U.S.C. 1319(g)(2)(A) and 1321(b)(6)(B)(i)).

(2) The assessment of a penalty under sections 1414(g)(3)(B) and 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300g–3(g)(3)(B) and 300h–2(c)), except where a respondent in a proceeding under section 1414(g)(3)(B) requests in its answer a hearing on the record in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 554.

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to proceedings under this subpart, except for the following provisions which do not apply: §§ 22.11, 22.16(c), 22.21(a), and 22.29. Where inconsistencies exist between this subpart and subparts A through G of this part, this subpart shall apply. Where inconsistencies exist between this subpart and subpart H of this part, subpart H shall apply.

§ 22.51 Presiding Officer.

The Presiding Officer shall be a Regional Judicial Officer. The Presiding Officer shall conduct the hearing, and rule on all motions until an initial decision has become final or has been appealed.

§ 22.52 Information exchange and discovery.

Respondent's information exchange pursuant to § 22.19(a) shall include information on any economic benefit resulting from any activity or failure to act which is alleged in the administrative complaint to be a violation of applicable law, including its gross revenues, delayed or avoided costs. Discovery under § 22.19(e) shall not be authorized, except for discovery of information concerning respondent's economic benefit from alleged violations and information concerning respondent's ability to pay a penalty.

PART 23—JUDICIAL REVIEW UNDER EPA-ADMINISTERED STATUTES

Sec.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j–7(a)(2), 300j–9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

ATTACHMENT 2

Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair, and Painting Rule; Lead-Based Paint Activities Rule

Consolidated Enforcement Response and Penalty Policy
for the
Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule

(LBP Consolidated ERPP)

Interim Final Policy

August, 2010

[Revised 4/05/2013]

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

Table of Contents

Section 1: Introduction, Overview and Background

I. Introduction

This document sets forth guidance for the U.S. Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount for violations of Title IV of the Toxic Substances Control Act (TSCA) which gives the Agency the authority to address lead-based paint (LBP) and LBP hazards in target housing, and other buildings and structures. The goal of this consolidated Enforcement Response and Penalty Policy (ERPP) is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations, with flexibility to allow for individual facts and circumstances of a particular case. The Renovation, Repair, and Painting Rule (RRP Rule),[1] Pre-Renovation Education Rule (PRE Rule),[2] and Lead-Based Paint Activities, Certification, and Training Rule (LBP Activities Rule)[3] were each promulgated under the authority of Title IV of TSCA and are addressed in this ERPP.[4]

This guidance applies only to violations of EPA's civil regulatory programs. It does not apply to enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA. The procedures set forth in this document are intended solely for the guidance of government professionals. They are not intended and cannot be relied on to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice. This policy is not binding on the Agency. Enforcement staff should continue to make appropriate case-by-case enforcement judgments, guided by, but not restricted or limited to, the policies contained in this document.

This Policy is immediately effective and applicable, and it supersedes any enforcement response or penalty guidance previously drafted or issued for the PRE Rule or LBP Activities Rule.

II. Overview of the Policy

This ERPP is divided into four main sections. The first section, "Introduction, Overview and Background" provides the statutory and regulatory setting for this policy. The second section, "Determining the Level of Enforcement Response," describes the Agency's options for

[1] 40 C.F.R. Part 745, Subparts E, L and Q (73 Fed. Reg. 21692; April 22, 2008) (amending the PRE Rule, LBP Activities Rule, and State/Tribal Programs Rule, respectively, at §§ 745.80-745.91, § 745.220, § 745.225, § 745.320, § 745.324, § 745.326, § 745.327, § 745.339). www.epa.gov/lead/pubs/renovation.htm#tenants, or www.gpoaccess.gov.
[2] 40 C.F.R. Part 745, Subpart E (§§ 745.80-745.88) (63 Fed. Reg. 29907; June 1, 1998).
[3] 40 C.F.R. Part 745, Subpart L (§§ 745.220 – 745.239) (61 Fed. Reg. 45778; August 29, 1996, as amended 64 Fed. Reg. 42849; August. 6, 1999).
[4] The § 1018 Disclosure Rule is addressed in a separate ERPP available in Appendix C at TSCA Enforcement Policy and Guidance Documents.

responding to violations of TSCA. The third section, "Assessing Civil Administrative Penalties," elaborates on EPA's policy and procedures for calculating civil penalties against persons who violate section 409 of TSCA by failing or refusing to comply with the regulatory requirements of the PRE, RRP and LBP Activities Rules. The forth section, the appendices, contains, among other things, tables to be used in calculating civil penalties for this policy. The appendices to this ERPP are: Appendix A - Violations and Circumstance Levels; Appendix B - Gravity-Based Penalty Matrices; Appendix C - References for Policy Documents; Appendix D - List of Supplemental Environmental Projects (SEPs).

III. Background

In 1992, the United States Congress enacted Title X - Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 United States Code (U.S.C.) § 4851 (enacted as Title X of the Housing and Community Development Act of 1992). Section 1021 of Title X amended the Toxic Substances Control Act to add Title IV, entitled "Lead Exposure Reduction."

Pursuant to Section 406(b) of TSCA, EPA promulgated regulations at 40 C.F.R. Part 745, Subpart E, residential property renovations, requiring, among other things, persons who perform for compensation a renovation of pre-1978 housing ("target housing") to provide a lead hazard information pamphlet to the owner and occupant prior to commencing the renovation.

Pursuant to Section 402(a) of TSCA, EPA promulgated regulations at 40 C.F.R. Part 745, Subpart L, Lead-Based Paint Activities, prescribing procedures and requirements for the accreditation of training programs and renovations, procedures and requirements for the certification of individuals and firms engaged in lead-based paint activities, work practice standards for performing such activities, and delegation of programs.

Pursuant to Section 402(c)(3) of TSCA, EPA promulgated regulations amending at 40 C.F.R. Part 745, Subparts E and L, residential property renovations, prescribing procedures and requirements for the accreditation of training programs, certification of individuals and firms, work practice standards for renovation, repair and painting activities in target housing and child occupied facilities, and delegation of programs (Subpart Q) under Section 404.

Pursuant to Section 408 of TSCA, each department, agency, and instrumentality of the executive, legislative, and judicial branches of the federal government is subject to all federal, state, interstate, and local requirements, both substantive and procedural, regarding lead-based paint, lead-based paint activities, and lead-based paint hazards.[5]

[5] Therefore, federal agencies are subject to the PRE, RRP, and LBP Activities Rules ERPP and EPA has statutory penalty authority over federal agencies for violations of the LBP, LBP activities and LBP hazard requirements (15 U.S.C. § 2688). Regions generally must notify and consult with OECA's Federal Facilities Enforcement Office prior to bringing an enforcement action against a federal agency. See, Appendix C, Memorandum, *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*.

Section 2: Determining the Level of Enforcement Response

The failure or refusal to comply with any requirement of the PRE, RRP, or LBP Activities Rules is a prohibited act under Section 409 of TSCA (15 U.S.C. § 2689) and civil penalties can be assessed to address such violations pursuant to Section 16 of TSCA (15 U.S.C. § 2615) for each violation of Section 409. A civil penalty action is the preferred enforcement response for most violations.

Once the Agency finds that a violation of TSCA has occurred, it will need to determine the appropriate level of enforcement response for the violation.[6] EPA can respond with a range of enforcement response options. These options include:

- Civil Administrative Complaints
- Notices of Noncompliance
- Civil Judicial Referrals
- Criminal Proceedings

I. Civil Administrative Complaints

A civil administrative complaint[7] is the appropriate response to violations of the PRE, RRP, and LBP Activities Rules or failure to comply with a Notice of Noncompliance. Violators may be subject to civil administrative action including the assessment of civil penalties, with or without conditions, pursuant to 15 U.S.C. § 2615(a). Civil penalties are to be assessed by the Administrator by an order made on the record, after the violator is given a written notice and opportunity to request a hearing on the order, within 15 days of the date the notice is received by the violator.

A civil administrative complaint may include a proposed penalty that has been calculated pursuant to this policy. Alternatively, the complaint may specify the number of violations for which a penalty is sought, a brief explanation of the severity of each violation alleged, and a recitation of the statutory penalty authority applicable for each violation in the complaint.[8] This latter approach would not eliminate the need for EPA to specify a proposed penalty during the course of the administrative litigation and explain in writing how the proposed penalty was calculated in accordance with 15 U.S.C. § 2615, but would postpone the requirement until after the filing of pre-hearing information exchanges, at which time each party shall have exchanged all factual information considered relevant to the assessment of a penalty.[9]

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[6] See, Appendix C, TSCA Enforcement Policy and Guidance Documents, Memorandum, *Final List of Nationally Significant Issues and Process for Raising Issues to TPED*; November 1, 1994 or current revision. The NSI guidance was developed as implementation guidance to a memorandum, *Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases*, Steven A. Herman, July 11, 1994.

[7] A pre-filing notice or letter may be issued prior to the filing of a civil administrative complaint.

[8] See, 40 C.F.R. § 22.14(a)(4).

[9] See, 40 C.F.R. § 22.19(a)(4).

Section 2: Determining the Level of Enforcement Response

A civil administrative action can result in an enforceable agreement and the assessment of a penalty or a decision rendered by an Administrative Law Judge.[10] Before an administrative penalty order becomes final, the Administrator must provide each Respondent, including federal agencies, with notice and an opportunity for a formal hearing, on the record,[11] in accordance with the Administrative Procedures Act. EPA's general rules of administrative practice are set forth in 40 C.F.R. Part 22, entitled "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits."

II. Notices of Noncompliance

On a case-by-case basis, EPA may determine that the issuance of a notice of noncompliance (NON),[12] rather than a civil administrative complaint is the most appropriate enforcement response to a violation.[13] A NON should be issued to address violations in the following circumstances:

i. Where a first time violator's violation has low probability of re-occurrence[14] and low potential for harm; or

ii. When a violator is in substantial compliance with the requirement as the specific facts and circumstances support.

A NON should, when necessary:

i. Require corrective action by a specified date to return the violator to full compliance and resolve the violation(s);

ii. Specify the type and nature of the corrective action necessary to return the violator to full compliance.

[10] EPA may, at its discretion, issue a press release or advisory to notify the public of the filing of an enforcement action, settlement, or adjudication concerning a person's violation of TSCA. A press release can be a useful tool to notify the public of Agency actions for TSCA noncompliance and specifically, to educate the public on the requirements of LBP Program. The issuance of a press release or advisory as well as the nature of their contents are within the sole discretion of the Agency and shall not be subject to negotiation with the violator. See, *Restrictions on Communicating with Outside Parties Regarding Enforcement Actions*, March 8, 2006.

[11] See, 15 U.S.C. § 2615(a)(2)(A).

[12] A NON is not a formal enforcement action since there is no opportunity to respond to the notice on the record.

[13] Supplementary guidance on this issuance of NONs in lieu of complaints may be provided for specific situations.

[14] For example, if the same violation occurred on several occasions (e.g., a renovation firm failed to comply with the PRE Rule at 3 separate renovations including 3 units in a multi-unit renovation project), a NON should not be issued because the renovation firm demonstrated a pattern and practice of repeated violations.

iii. Require proof that the corrective action was taken by the specified date to demonstrate to the Agency's satisfaction that further action is not necessary to resolve the violation(s) and prevent recurrence; and

iv. Be placed in the violator's inspection, case development report record, or other file to document the Agency's response.

A NON should not:

i. Be issued to a violator for a subsequent violation of a provision of the same rule (e.g., the RRP Rule) reoccurring within 5 years; or

ii. Impose a monetary penalty.

III. Civil Judicial Referrals

EPA may ask the United States Department of Justice (DOJ) to seek injunctive relief in United States District Court under Section 17(a) of TSCA, 15 U.S.C. § 2616(a), to direct a violator to comply with the PRE, RRP, or LBP Activities Rules.

Civil Administrative Penalty and Injunction Relief: There may be instances in which the concurrent filing of a civil administrative complaint for penalty and a request for civil judicial injunctive relief under TSCA is appropriate.

IV. Criminal Proceedings

This ERPP does not address criminal violations of TSCA. However, if the civil case team has reason to believe that a violator knowingly violated any provision of TSCA, it should promptly refer the matter to the Criminal Investigation Division (CID). TSCA's criminal penalties are found in Section 16(b).[15] In addition, pursuant to 18 U.S.C. Section 1001, it is a criminal violation to knowingly and willfully make a false or fraudulent statement in any matter within EPA's jurisdiction. In addition, it may be considered a criminal violation to knowingly or willfully falsify information provided to the Agency.

V. Parallel Criminal and Civil Proceedings

Although the majority of EPA's enforcement actions are brought as either a civil action or a criminal action, there are instances when it is appropriate to bring both a civil and a criminal action. These include situations where the violations merit the deterrent and retributive effects of

[15] See, 15 U.S.C. § 2615(b).

criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

Active consultation and cooperation between EPA's civil and criminal programs, in conformance with all legal requirements, including OECA's policy on parallel proceedings,[16] are critical to the success of EPA's overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal program when there are significant developments that might change the scope of the relief. In every parallel proceeding, communication and coordination should be initiated at both the staff and management levels and should continue until resolution of all parallel matters.

[16] See, Appendix C, TSCA Enforcement Policy and Guidance Documents, Memorandum, *Parallel Proceedings Policy*, Granta Y. Nakayama, September 24, 2007.

Section 3: Assessing Civil Administrative Penalties

I. Computation of the Penalty

In determining the amount of any civil penalty for violations of the PRE, RRP, or LBP Activities Rules, "…the Administrator shall 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."[17] On September 10, 1980, EPA published "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy"[18] which describes in greater detail the "civil penalty system" under TSCA. The purpose of this system is to ensure that civil penalties are assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated and the penalty is a sufficient deterrent to future violations. The TSCA civil penalty system provides standard definitions and a calculation methodology for application of the statutory penalty factors that TSCA requires the Administrator to consider in assessing a civil penalty. The TSCA civil penalty system also states that as regulations are developed, specific penalty guidelines, such as this ERPP, will be developed adopting in detail the application of the general civil penalty system to the new regulation. In developing a proposed penalty, EPA will take into account the particular facts and circumstances of each case, with specific reference to the TSCA statutory penalty factors. This ERPP follows the general framework described in the 1980 "Guidelines" for applying the TSCA statutory penalty factors to violations in civil administrative enforcement cases.[19]

For each violation, the penalty amount is determined in a multi-step process:

1. Determine the number of independently assessable violations.

2. Determine the economic benefit.[20] One component of the total penalty is the estimated amount of economic benefit the respondent realized from non-compliance. This calculation is also subject to adjustment based on the violator's ability to pay/ability to continue in business. Considerations for calculating economic benefit are discussed in Item III "Economic Benefit of Noncompliance" and Item V "Ability to Pay/Continue in Business," of this Section.[21]

[17] See, 15 U.S.C. 2615(a)(2)(B)

[18] See, Appendix C, TSCA Enforcement Policy and Guidance Documents, *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59771, September 10, 1980. The Guidelines focus on what the proper civil penalty should be if a decision is made that a civil penalty is the proper enforcement remedy. The Guidelines do not discuss whether the assessment of a civil penalty is the correct enforcement response to a specific violation.

[19] EPA will not apply civil administrative penalty policies in civil judicial context, but rather will apply statutory factors.

[20] Determining economic benefit is not specifically required by the Act, but is authorized under the "as justice may require" factor of 15 U.S. C. § 2615(a)(2)(B). See, 45 Fed. Reg. 59771, September 10, 1980.

[21] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.

Section 3: Assessing Civil Administrative Penalties

3. Determine the gravity-based penalty. The other component of the total penalty is the gravity-based penalty. Under the TSCA Civil Penalty Guidelines, gravity-based penalties are determined in two stages:

    a. The first stage is the determination of a gravity-based penalty (GBP) (gravity refers to the overall seriousness of the violation).
    To determine the gravity-based penalty, the following factors are considered:

        i. The nature of the violation;

        ii. The circumstances of the violation; and

        iii. The extent of harm that may result from a given violation.

These factors are incorporated into the penalty matrices in Appendix B that specify the appropriate gravity-based penalty[22] and are discussed in more detail in Item IV of this section.

The penalty amounts in the gravity based penalty matrices in Appendix B have been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. EPA has thus increased the maximum penalty amounts for TSCA violations to $37,500.[23] Additional penalty inflation increases occur periodically and are incorporated by reference into this ERPP.

    b. The second stage involves adjusting the gravity-based penalty upward or downward. Adjustments to the penalty amount are made by considering several factors including the following:

        i. The violator's ability to pay/ability to continue in business;

        ii. The violator's history of prior violations;

        iii. The violator's degree of culpability; and

        iv. Such other matters as justice may require.

These adjustments are discussed in more detail in Item V of this Section.[24]

[22] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.
[23] See, *Civil Monetary Inflation Adjustment Rule*, 73 Fed. Reg. 75340, December 11, 2008.
[24] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.

II. Independently Assessable Violations

A separate civil penalty, up to the statutory maximum, can be assessed for each independent violation of TSCA. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is being assessed or if at least one of the elements of proof is different from any other violation.

Each requirement of the PRE, RRP, and LBP Activities Rules is a separate and distinct requirement and a failure to comply with any requirement is a violation of the PRE, RRP, or LBP Activities Rules. To determine whether a violation of the PRE, RRP, or LBP Activities Rules has occurred, the applicable requirements must be reviewed to determine which regulatory provisions have been violated.

Examples of the training provider requirements:

- Employ a training manager who has the requisite experience, education, and/or training.
- Meet the minimum training curriculum requirements for each of the disciplines.

Examples of the pre-renovation education requirements:

- Deliver pamphlet to the owner and adult occupant before renovation begins (but not more than 60 days before work begins) **or** mail pamphlet to owner at least 7 days before renovation begins.
- Obtain from the owner and adult occupant, written acknowledgement that they received the pamphlet or obtain a certificate of mailing at least 7 days before the renovation begins.

Examples of a renovation/abatement project:

- Retain all records for 3 years following completion of a project to demonstrate compliance with the PRE, RRP, or LBP Activities Rules.
- Follow work practice standards in each unit of a multi-family housing building.

After identifying each applicable regulatory requirement, the next step is to determine the number of renovations that took place or the number of affected persons to which information was required to be distributed or training provided. The total number of violations depends in part on the number of renovations or on the number of affected entities to which information was required to be distributed. For example:

1. A renovator contracts with a homeowner for renovation activities within the homeowner's one owner-occupied unit. Even if several renovation activities were conducted at that location, the activity is considered one renovation for purposes of determining whether violations of the PRE Rule occurred, since only one person needs to be notified – the homeowner.

2. A renovator contracted with an owner of a multi-unit apartment building for 20 units to undergo renovation. This resulted in 20 separate requirements to comply with the PRE Rule for purposes of determining the number of violations because each unit had a separate adult occupant that the renovator needed to contact.

3. In another example, if there are three unrelated children under the age of 6 at a child-occupied facility undergoing renovation and the renovator fails to notify the parents/guardians of all 3 children, the total number of violations for failure to provide the pamphlet is 3.

Similar calculations can be performed for applicable requirements for other parts of the PRE, RRP, and LBP Activities Rules to determine which regulatory provisions have been violated. A detailed list of some, but not all, potential violations of the PRE, RRP, and LBP Activities Rules is provided in Appendix A.

III. Economic Benefit of Noncompliance

An individual renovator, renovation or abatement contractor, training firm, or any other entity that has violated the PRE, RRP, or LBP Activities Rule(s) and Section 409 of TSCA should not profit from their actions.

The Agency's Policy on Civil Penalties (EPA General Enforcement Policy #GM-21), dated February 16, 1984, mandates the recapture of any significant economic benefit (EBN) that accrues to a violator from noncompliance with the law. Economic benefit can result from a violator delaying or avoiding compliance costs or when a violator otherwise realizes illegal profits through its noncompliance. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties. Note that economic benefit can not exceed the statutory maximum penalty amount.

An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. "Significant" is defined as an economic benefit that totals more than $50 per room renovated per

renovation project[25] for all applicable violations alleged in the complaint. In the interest of simplifying and expediting an enforcement action, enforcement professionals may use the "rules of thumb" (discussed in Section 3. IV. b., below) to determine if the economic benefit will be significant.

EPA generally will not settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling for less than the economic benefit may be appropriate. Since issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor. The four exceptions are:

- The economic benefit component is an insignificant amount (defined for purposes of this policy as less than $50 per room renovated per renovation project);
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- The company has documented an inability to pay the total proposed penalty.[26]

a. Economic Benefit from Delayed Costs and Avoided Costs

Delayed costs are expenditures that have been deferred by the violator's failure to comply with the requirements. The violator eventually will spend the money to achieve compliance. Delayed costs are either capital costs (i.e., equipment), if any, or one-time non-depreciable costs (e.g., certification fees for renovation firms, tuition fees for courses for certification).

Avoided costs are expenditures that will never be incurred, as in the case of a failure to implement renovation or abatement work practices. In this example, avoided costs include all the costs associated with procuring supplies and implementing engineering controls for dust or using banned practices for LBP removal. Those costs were never and will never be incurred.

b. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "rules of thumb" to calculate the economic benefit of noncompliance. The "rules of thumb" are straight-

[25] Alternatively, cost information can be derived from the *Economic Analysis for the TSCA Lead Renovation, Repair and Painting Program Final Rule for Target Housing and Child-Occupied Facilities*; Economic and Policy Analysis Branch, Exposure and Technology Division, Office of Pollution Prevention and Toxics. March, 2008.
[26] See, Section 3, Item V; Modification of Penalty, for a discussion of ability to pay/continue in business.

forward methods to calculate economic savings from delayed and avoided compliance expenditures. They are discussed more fully in the Agency's General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984, at pages 7-9. The "rule of thumb" methodology is available in a Lotus spreadsheet available to EPA enforcement professionals from the Special Litigation and Projects Division of the Office of Civil Enforcement. Enforcement professionals may use the "rules of thumb" whenever the economic benefit penalty is not substantial (generally under $50 per room renovated per renovation project) and use of an expert financial witness may not be warranted. If the "rules of thumb" yield an amount over $50 per room renovated per renovation project, the case developer should use the BEN model and/or an expert financial witness to calculate the higher economic benefit penalty. Using the "rules of thumb," the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital costs, if any, and/or one-time non-depreciable costs for the period from the date the violation began until compliance was or is expected to be achieved. For avoided annual costs, the "rule of thumb" is the annual expenses avoided until the date compliance is achieved less any tax savings. These rules of thumb do not apply to avoided one-time or avoided capital costs. Enforcement professionals should calculate the economic benefit of avoided one-time and avoided capital costs, if any, by using the BEN model.

The primary purpose of the BEN model is to calculate economic savings for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including optional data items and standard values already contained in the program. Enforcement professionals wishing to use the BEN model should take the Basic BEN training course offered by the Special Litigation and Projects Division in cooperation with NETI. Enforcement professionals who have questions while running the model can access the model's help system which contains information on how to: use BEN, understand the data needed, and understand the model's outputs.

The economic benefit component should be calculated for the entire period for which there is evidence of noncompliance, i.e., all time periods for which there is evidence to support the conclusions that the respondent was violating TSCA and thereby gained an economic benefit. Such evidence should be considered in the assessment of the penalty proposed for the violations alleged or proven, up to the statutory maximum for those violations. In certain cases, credible evidence may demonstrate that a respondent received an economic benefit for noncompliance for a period longer than the period of the violations for which a penalty is sought. In such cases, it may be appropriate to consider all of the economic benefit evidence in determining the appropriate penalty for the violations for which the respondent is liable. For example, the economic benefit component of a penalty for failure to comply with work practice standards at a large, multi-year renovation project during which EPA conducted compliance monitoring for only one year should be based on a consideration of the economic benefit gained for the entire period of the renovation, but the total penalty is limited to the statutory maximum for the specific violations alleged and proven.

In most cases, the violator will have the funds gained through non-compliance available for its continued use or competitive advantage until it pays the penalty. Therefore, for cases in which economic benefit is calculated by using BEN or by a financial expert, the economic benefit should be calculated through the anticipated date a consent agreement would be entered. If the matter goes to hearing, this calculation should be based on a penalty payment date corresponding with the relevant hearing date. It should be noted that the respondent will continue to accrue additional economic benefits after the hearing date, until the assessed penalty is paid. However, there are exceptions for determining the period of economic benefit when using a "rule of thumb." In those instances, the economic benefit is calculated in the manner described in the first paragraph of this subsection.

IV. Gravity-Based Penalty

Lead poisoning in children, including poisoning in-utero, causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems. In severe cases it may lead to seizures, coma, and death. In as many as 38 million homes in the United States, children's health is endangered by lead-based paint and/or lead-based paint hazards. Lead in housing and child-occupied facilities remains the most important source of lead exposure for young children and pregnant women. Providing information about the dangers from lead exposures and controlling exposures to lead is the focus of the PRE, RRP, and LBP Activates Rules. The nature and circumstance of a violation of these rules and the extent to which the violation poses a potential for harm are incorporated into the matrices that specify the appropriate gravity-based penalty for that specific or similar violations.

Nature

The TSCA Civil Penalty Guidelines define the nature of a violation as the essential character of the violation, and incorporates the concept of whether the violation is of a "chemical control," "control-associated data gathering," or "hazard assessment" nature. With respect to both the RRP and LBP Activities Rules, the requirements are best characterized as "chemical control" in nature because they are aimed at limiting exposure and risk presented by lead-based paint by controlling how lead-based paint is handled by renovators and abatement contractors. In contrast, the requirements of the PRE Rule are best characterized as "hazard assessment" in nature. The PRE Rule requirements are designed to provide owners and occupants of target housing, owners and proprietors of child-occupied facilities, and parents and/or guardians of children under the age of 6 in child-occupied facilities, with information that will allow them to weigh and assess the risks presented by renovations and to take proper precautions to avoid the hazards. This information is vital to occupants of target housing and child-occupied facilities undergoing renovations or abatements to enable them to take proper precautions to avoid unnecessary exposure, especially to children under the age of 6 and pregnant women, that may be created during a renovation or abatement activity. The "nature" of the violation will have a

direct effect on the measure used to determine the appropriate "circumstance" and "extent" categories are selected on the GBP Matrix in Appendix B.

Circumstance

The term "circumstance" represents the probability of harm resulting from a particular type of violation. The PRE, RRP, and LBP Activities Rules constitute a comprehensive lead-based paint regulatory program. The PRE Rule requirements provide a warning of dangers from lead associated with pending renovations or abatements. The RRP Rule and LBP Activities Rule requirements provide for engineering controls to limit exposures to lead during renovation and abatements and the cleanup procedures to reduce exposures to lead following renovations and abatements. Post-cleanup sampling provides for verification of the effectiveness of the engineering controls and cleanup procedures by testing for residual exposures, if any, to lead.

Therefore, the 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 exposures will be inadequately controlled during renovations, or that residual hazards and exposures will persist after the renovation/abatement work is completed.

Under the TSCA Penalty Guidelines, "Circumstances" are categorized as *High*, *Medium,* and *Low* and each category has two levels, for a total of six Circumstance levels. Consequently, the ERPP ranks potential violations using 6 levels that factor in compliance with the requirements of the PRE, RRP, or LBP Activities Rules. These requirements are associated with lack of knowledge of lead-based paint and lead-based paint hazards, increased exposure to lead or lead hazards, and verification of lead or lead hazard reduction after the actual renovation/abatement work is completed. For example:

1. For a PRE Rule violation, the harm is associated with the failure to provide information on LBP hazards prior to renovations (a "hazard assessment" activity by its nature under this policy). Therefore, the primary circumstance to be considered is the occupant's ability to assess and weigh, via the PRE Rule notification process, the factors associated with the risk to their health from the planned renovation, so they can take proper precautions to avoid any lead hazards.

2. For a RRP Rule violation of the technical workplace standards, the harm is associated with the failure to control exposures to lead during a renovation (i.e., a "chemical control" activity by its nature under this policy). Therefore, the primary Circumstance to be considered is whether the specific violation has a high, medium, or low probability of impacting human health.

For purposes of this policy, specific violations of the PRE, RRP, and LBP Activities Rules have been categorized as follows:

Levels 1 and 2: Violations having a high probability of impacting human health and the environment.

Levels 3 and 4: Violations having a medium probability of impacting human health and the environment.

Levels 5 and 6: Violations having a low probability of impacting human health and the environment.

Extent

The term "extent" represents the degree, range, or scope of a violation's potential for harm. The TSCA Penalty Guidelines provide three "extent" categories: *Major*, *Significant*, and *Minor*. In the context of the PRE, RRP, and LBP Activities Rules, the measure of the "extent" of harm focuses on the overall intent of the rules and the amount of harm the rules are designed to prevent (e.g., serious health effects from childhood lead poisoning). For example, the potential for harm due to the failure of the renovator to provide the *Renovate Right* pamphlet could be considered "Major" if risk factors are high for exposure. In the example of an RRP violation of the technical workplace standards, the harm is associated with the failure to control exposures to lead during a renovation. Therefore, the primary consideration for determining the extent of harm to be considered is whether the specific violation could have a serious or significant or minor impact on human health, with the greatest concern being for the health of a child under 6 years of age and a pregnant woman in target housing. Even in the absence of harm in the form of direct exposures to lead hazards, the gravity component of the penalty should reflect the seriousness of the violation in terms of its effect on the regulatory program. For example, course completion certificates are used by inspectors to identify individuals at worksites who must perform key renovation activities under the RRP Rule. This allows inspectors to efficiently identify those individuals excluded from regulated renovation activities that require certified renovators and to document that each renovation firm employs and uses a certified renovator. TSCA Civil Penalty Guidelines provide the following definitions for the 3 Extent categories:

Major: Potential for serious damage to human health or the environment.

Significant: Potential for significant damage to human health or the environment.

Minor: Potential for lesser amount of damage to human health or the environment.

Under these categories, the appropriate extent category for failure or refusal to comply with the provisions of the Rules is based upon 3 determinable facts:

- The age of any children who occupy target housing;

- Whether a pregnant woman occupies target housing; and

- Whether a child or children under six had access to the child-occupied facility during renovations/abatements.

Age of child(ren) occupying target housing: Age will be determined by the age of the youngest child residing in the target housing at the time the violation occurred or at the time the renovation occurred. However, any individual can be adversely affected by exposure to lead. Children under the age of 6 are most likely to be adversely affected by the presence of lead-based paint and/or lead-based paint hazards based on habits (particularly hand-to-mouth activity) and vulnerability due to their physical development.

If EPA knows or has reason to believe that a child under the age of 6 is present, then for purposes of proposing a gravity-based penalty, the Major extent category should be used. Where the age of the youngest individual is not known, or a respondent is able to demonstrate to EPA's satisfaction that the youngest individual residing in the target housing at the time of the violation was at least 6 years of age and less than eighteen, then a Significant extent factor should be used. Where a respondent is able to demonstrate to EPA's satisfaction that no individuals younger than eighteen were residing in the target housing at the time of the violation, then a Minor extent factor should be used.

Pregnant women living in target housing: Lead exposure before or during pregnancy can alter fetal development and cause miscarriages. If EPA determines that a pregnant woman occupied the target housing at the time a violation occurred, then a Major extent should be used.

Child-occupied facilities: Child-occupied facilities are, by definition, regularly visited by the same child(ren) under the age of 6. EPA will generally consider failures by renovation/abatement firms to notify parents or guardians of children under 6 as Major in extent. Where a respondent demonstrates to EPA's satisfaction that no children under 6 visited the facility during the renovation (*i.e.,* from the beginning of the renovation through the final cleaning verification), such as during an elementary school's summer break, then an extent factor other than Major should be used.

V. Modification of the Penalty

In addition to the factors discussed in Subsection IV Gravity-Based Penalty above, EPA shall also consider regarding the violations which are the subject of the specific action, with respect to the violator:

- The degree of culpability;

- Any history of prior such violations;

- The ability to pay/ability to continue to do business; and

- Such other matters as justice may require.[27]

All appropriate upward adjustments of the gravity-based penalty amount should be made prior to the issuance of the proposed penalty, while downward adjustments[28] generally should not be made until after the proposed penalty has been issued, at which time these factors may be considered either during settlement negotiations or litigation.

Degree of Culpability

This factor may be used to increase or decrease the gravity-based penalty. TSCA is a strict liability statute for civil actions, so that culpability is irrelevant to the determination of legal liability. However, this does not render the violator's culpability irrelevant in assessing an appropriate penalty. Knowing or willful violations generally reflect an increased culpability on the part of the violator and may even give rise to criminal liability. The culpability of the violator should be reflected in the amount of the penalty, which may be adjusted upward or downward by up to 25% for this factor. In assessing the degree of culpability, all of the following points should be considered:

- Amount of control the violator had over the events constituting the violation;

- Level of sophistication (knowledge of the regulations) of the violator in dealing with compliance issues; and

- Extent to which the violator knew, or should have known, of the legal requirement that was violated. (For example, was the violator previously informed of the federal requirement to provide the "*Renovate Right*" pamphlet in a prior notice of a local code violation from a local building permit or code office?)

History of Prior Violations

A prior history of violations of the PRE, RRP, or LBP Activities Rules should be reflected in the amount of the penalty. The gravity-based penalty matrices are designed to apply to "first offenders." Where a violator has demonstrated a similar history of "such violations" the Act requires the penalty to be adjusted upward by as much as 25% under the *Guidelines for Assessment of Civil Penalties under Section 16 of TSCA*. The need for such an upward adjustment is usually justified because the violator has not been sufficiently motivated to comply

[27] See, 15 U.S.C. § 2615(a)(2)(B). Under unusual circumstances there may be other factors not specified herein that must be considered to reach a just resolution.
[28] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.

with the PRE, RRP, or LBP Activities Rules by the penalty assessed for the previous violation(s).

For the purpose of this policy, EPA interprets "prior such violations" to mean any prior violation(s) of the PRE, RRP, or LBP Activities Rules. For example, the following guidelines apply in evaluating the history of such violations to the PRE Rule:

To constitute a prior violation:

1. The prior violation must have resulted in a consent agreement and final order or consent order (CAFO), consent decree, default judgment (judicial decision), or criminal conviction; and

2. The resulting order/judgment/conviction was entered or executed within five calendar years prior to the date the subsequent violation occurred. Receipt of payment made to the U.S. Treasury can be used as evidence constituting a prior violation, regardless of whether a respondent admits to the violation and/or enters into a CAFO. Issuance of a NON does not constitute a prior violation for purposes of this policy since no violation is formally found and no opportunity to contest the notice is provided. In order to constitute a prior violation, a prior violation must have resulted in a final order. Violations litigated in Federal courts under the Act's imminent hazard (§ 7), specific enforcement and seizure (§ 17), and criminal (§ 16(b)) provisions, are also part of a violators history for penalty assessment purposes.

- Two or more corporations or business entities owned by, or affiliated with, the same parent corporation or business entity may not necessarily affect each other's history (such as with independently-owned franchises) if they are substantially independent of one another in their management and in the functioning of their Boards of Directors. EPA reserves the right to request, obtain, and review all underlying and supporting financial documents that elucidate relationships between entities to verify their accuracy. If the violator fails to provide the necessary information, and the information is not readily available through other sources, then EPA is entitled to rely on the information it does have in its control or possession.

- In the case of wholly-owned subsidiaries, the parent corporation's history of violation will apply to all of its subsidiaries. Similarly, the history of violation for a wholly-owned subsidiary will apply to the parent corporation.

Section 3: Assessing Civil Administrative Penalties

Ability to Pay/Continue in Business

Section 16(a)(2)(B) of TSCA requires that the violator's ability to pay the proposed civil penalty be considered as a statutory factor in determining the amount of the penalty. Absent proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and annual revenue. Once this is done, the burden is on the respondent to demonstrate an inability to pay all or a portion of the calculated civil penalty.[29]

To determine the appropriateness of the proposed penalty in relation to a person's ability to pay, the case team should review publicly-available information, such as Dun and Bradstreet reports, a company's filings with the Securities and Exchange Commission (when appropriate), or other available financial reports before issuing the complaint. In determining the amount of a penalty for a violator when financial information is not publicly-available, relevant facts obtained concerning the number of renovation contracts signed by a violator and the total revenues generated from such renovation contracts may offer insight regarding the violator's ability to pay the penalty.

The Agency will notify the respondent of its right under the statute to have EPA consider its ability to continue in business in determining the amount of the penalty. Any respondent may raise the issue of ability to pay/ability to continue in business in its answer to the complaint or during the course of settlement negotiations. If a respondent raises "inability to pay" as a defense in its answer or in the course of settlement negotiations, the Agency should ask the respondent to present appropriate documentation, such as tax returns and financial statements. The respondent should provide records that conform to generally accepted accounting principles and procedures at its expense. EPA generally should request the following types of information:

- The last three to five years of tax returns;
- Balance sheets;
- Income statements;
- Statements of changes in financial position;

[29] Note that under the Environmental Appeals Board ruling in *In re: New Waterbury*, LTD, *5* E.A.D. 529 (EAB 1994), in administrative enforcement actions for violations under statutes that specify ability to pay (which is analogous to ability to continue in business) as a factor to be considered in determining the penalty amount, EPA must prove it adequately considered the appropriateness of the penalty in light of all of the statutory factors. Accordingly, enforcement professionals should be prepared to demonstrate that they considered the respondent's ability to continue in business as well as the other statutory penalty factors and that their recommended penalty is supported by their analysis of those factors. EPA may obtain information regarding a respondent's ability to continue in business from the respondent, independent commercial financial reports, or other credible sources.

- Statement of operations;
- Information on business and corporate structure;
- Retained earnings statements;
- Loan applications, financing agreements, security agreements;
- Annual and quarterly reports to shareholders and the SEC, including 10K reports; and
- Statements of assets and liabilities.

There are several sources available to assist enforcement professionals in determining a respondent's ability to pay. Enforcement professionals considering a respondent's ability to continue in business should consult "A Framework for Statute-Specific Approaches to Penalty Assessments" (cited above) and EPA General Enforcement Policy PT.2-1 (previously codified as GM-#56), entitled "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" (December 16, 1986). In addition, the Agency has three computer models available to help assess whether violators can afford compliance costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. INDIPAY analyzes individual taxpayers' claims about inability to pay. MUNIPAY analyzes ability to pay for cities, towns, and villages. These models are designed for settlement purposes only.

ABEL is an EPA computer model that is designed to assess inability to pay claims from corporations and partnerships. The evaluation is based on the firm's excess cash flow. ABEL looks at the money coming into the entity and the money going out. It then looks at whether the excess cash flow is sufficient to cover the firm's environmental responsibilities (i.e., compliance costs) and the proposed civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm or individual is unable to pay the full penalty. These include:

- Certificates of deposit, money market funds, or other liquid assets;
- Reduction in business expenses such as advertising, entertainment, or compensation of corporate officers;
- Sale or mortgage of non-liquid assets such as company cars, aircraft, or land; and
- Related entities (e.g., the violator is a wholly owned subsidiary of Fortune 500 company).

Section 3: Assessing Civil Administrative Penalties

A respondent may argue that it cannot afford to pay the proposed penalty even though the penalty as adjusted does not exceed EPA's assessment of its ability to pay. In such cases, EPA may consider a delayed payment schedule calculated in accordance with Agency installment payment guidance and regulations.[30] In exceptional circumstances, EPA may also consider further adjustment below the calculated ability to pay.

Finally, EPA will generally not collect a civil penalty that exceeds a violator's ability to pay as evidenced by a detailed tax, accounting, and financial analysis.[31] However, it is important that the regulated community not choose noncompliance as a way of aiding financially troubled businesses. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the respondent's ability to pay, cause bankruptcy, or result in a respondent's inability to continue in business. Such circumstances may exist where the violations are egregious[32] or the violator refuses to pay the penalty. However, if the case is generated out of an EPA regional office, the case file must contain a written explanation, signed by the regional authority duly delegated to issue and settle administrative penalty orders under TSCA, which explains the reasons for exceeding the "ability to pay" guidelines. To ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business, the regions should consult with the Waste and Chemical Enforcement Division (WCED).[33]

Size of Violator: EPA estimated[34] that about 394,000 firms supply renovation services nationwide including 82,800 small residential remodeling firms that employ less than 4 people. An additional 1.2 million people are self-employed contractors covered under the RRP Rule, including 194,000 residential remodelers. The general presumption is that small, independent renovation firms lack the level of knowledge and awareness of the LBP rules shared by larger renovators with more employees and more extensive involvement in the renovation industry. Therefore, this factor should be considered when considering economic benefit from noncompliance, ability to pay/continue in business[35] for very small firms and the self-employed.

[30] See, 40 C.F.R. § 13.18.
[31] See, TSCA Penalty Guidelines, 45 Fed. Reg. 59775, September 1, 1980. Each financial analysis of a respondent's ability to pay should assume an ability to pay at least a small penalty to acknowledge and reinforce the respondent's obligations to comply with the regulatory requirements cited as violations in the civil administrative complaint.
[32] An example of an egregious situation would be where a firm or individual renovator failed to follow any work practice standard, including containment, cleanup, or post-cleanup verification, or used prohibited or restricted practices which resulted in a paint, dust, or soil lead hazard in target housing where a pregnant woman or child under 6 resided or in a child occupied facility.
[33] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.
[34] See, Footnote 25, pages 2-16 through 2-20.
[35] See, Footnote 31, concerning reinforcing a respondent's obligation to comply.

Other Factors as Justice May Require

This provision allows an adjustment to the gravity-based component of a penalty for other factors which may arise on a case-by-case basis. The factors discussed in this section may or may not be known at the time a pre-filing letter is sent or a complaint is issued. To the extent that these and other relevant factors become known, adjustments to gravity-based penalties calculated using the factors in Section 3. IV. above, may be made prior to issuing a complaint or at any time thereafter.

Voluntary Disclosure of Violations prior to an Inspection, Investigation, or Tip/Complaint

Violations must be disclosed to EPA before the Agency receives any information about the violations or initiates an inspection or investigation of the firm or individual. No penalty reductions should be given under the Audit Policy, Small Business Policy, or for other voluntary disclosures where the penalties are based on inspections or other investigations.

Audit Policy: A renovator who conducts an audit and voluntarily self-discloses any violations of the PRE, RRP, or LBP Activities Rules under the "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations" (65 FR 19618, April 11, 2000 (Audit Policy)), may be eligible for a reduction of the gravity-based penalty if all the criteria established in the audit policy are met.[36] Reference must be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

Small Business Policy: A business with fewer than 100 employees may be eligible for a reduction of a gravity-based penalty under the EPA's Policy on Compliance Incentives for Small Business (Small Business Policy, June 10, 1996).[37] Reference must be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

Voluntary Disclosures: If a firm or individual self-disclosures a violation of the PRE, RRP, or LBP Activities Rules but does not qualify for consideration under either the Audit Policy or the Small Business Policy, the proposed civil penalty amount may still be reduced for such voluntary disclosure. To encourage voluntary disclosures of violations, EPA may make a reduction of up to 10% of the gravity-based penalty. An additional reduction up to 10% (for a total reduction of up to 20%) may be given to those violators who report the potential violation to EPA within 30 days of self-discovery of the violation(s).

[36] See, Appendix C, Audit Policy
[37] See, Appendix C, Small Business Policy.

Section 3: Assessing Civil Administrative Penalties

Attitude

In cases where a settlement is negotiated prior to a hearing, after other factors have been applied as appropriate, EPA may reduce the resulting adjusted proposed gravity-based penalty up to a total of 30%, but not more than the calculated economic benefit from non-compliance for attitude,[38] if the circumstances warrant. In addition to creating an incentive for cooperative behavior during the compliance evaluation and enforcement process, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. The attitude adjustment has 3 components: cooperation, immediate steps taken to comply with the LBP rules, and early settlement:

- EPA may reduce the adjusted proposed penalty up to 10% based on a respondent's cooperation throughout the entire compliance monitoring, case development, and settlement process.

- EPA may reduce the adjusted proposed penalty up to 10% for a respondent's immediate good faith efforts to comply with the violated regulation and the speed and completeness with which it comes into compliance.

- EPA may reduce the adjusted proposed penalty up to 10% if the case is settled before the filing of pre-hearing exchange documents.

Special Circumstances/Extraordinary Adjustments

A case may present other factors that the case team believes justify a further reduction of the penalty.[39] For example, a case may have particular litigation strengths or weaknesses that have not been adequately captured in other areas of this ERPP. If the facts of the case or the nature of the violation(s) at issue reduce the strength of the Agency's case, then an additional penalty reduction may be appropriate. In such circumstances, the case team should contact OECA to discuss.[40] If after careful consideration, the case team determines that an additional reduction of the penalty is warranted, it should ensure the case file includes substantive reasons why the extraordinary reduction of the civil penalty is appropriate, including: (1) why the penalty derived from the TSCA civil penalty matrices and gravity adjustment is inequitable; (2) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; (3) the manner in which the adjustment of the penalty effectuated the purposes of the Act; and (4) documentation of management concurrence in the extraordinary reduction. EPA should still obtain a penalty sufficient to remove any economic incentive for violating applicable TSCA requirements.

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[38] See, TSCA Civil Penalty Guidance, attitude of the violator. 45 Fed. Reg. 59773; September 10, 1980

[39] See, Appendix C, TSCA Enforcement Policy and Guidance Documents, Memorandum, *Documenting Penalty Calculations and Justifications of EPA Enforcement Actions*, James Strock, August 9, 1990.

[40] See, Footnote 6. Please consult the current document for any requirement for consultation or concurrence.

VI. Adjusting Proposed Penalties in Settlement

Certain circumstances may justify adjustment of the proposed penalty. These circumstances may come to EPA's attention when a respondent files an answer to a civil complaint or during pre-filing settlement discussions under the *Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties*, 40 C.F.R. Part 22.

1) Factual Changes

EPA will recalculate the proposed penalty if the respondent can demonstrate that facts material to the initial calculation are different. For example:

- The owner of a property undergoing renovation/abatement provides appropriate documentation[41] that the portion of the property undergoing renovation/abatement is lead-based paint free;

- A renovator or renovation firm provides appropriate documentation that it was renovating/abating a portion of property previously demonstrated to them to be LBP free; or

- A renovator or renovation firm provides appropriate documentation that it had renovated/ abated a portion of property subsequently demonstrated to them to be LBP free.

In every case, the burden is on the respondent to raise those new factors which may justify the recalculation, consistent with the new facts.

2) Remittance of Penalty

The statute authorizes the Administrator to compromise, modify or remit, with or without condition, any civil penalty which may be imposed under this section.[42] EPA has issued a policy on implementing this subsection.[43] An example of the application of this policy would be the remittance of a portion of the unadjusted gravity-based penalty developed for violations of the RRP Rule in consideration of acceptance of a suspension or revocation of the violator's LBP certification or training authorization. The violator would still be liable for a penalty for any economic benefit accrued as a result of the violation(s). The terms of the remittance and suspension or revocation must be incorporated into a Compliance Agreement and Final Order.[44]

[41] "Appropriate documentation" or "demonstration" such as reports of lead inspections conducted in accordance with HUD's Guidelines for Assessment of Lead-Based Paint and Lead-Based Paint Hazards.
[42] See, 15 U.S.C. 2615(a)(2)(C), Section 16(a)(2)(C) of TSCA.
[43] See, Appendix C, TSCA Enforcement Policy and Guidance Documents; Memorandum, *Settlement with Conditions*, A. E. Conroy II, November 16, 1983.
[44] This provision may also be used to remit penalties in exchange for the completion of projects similar to those projects implemented under the Supplemental Environmental Projects program.

The Chief of the Chemical Risk and Reporting Branch must concur before an offer to remit is made under this ERPP.[45]

3) Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects that a respondent agrees to undertake in settlement of an environmental enforcement action, but that the respondent is not otherwise legally required to perform. In return, the cost of the SEP reduces the amount of the final penalty paid by the respondent. SEPs are only available in negotiated settlements.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform the proposed SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The SEP Policy,[46] defines categories of projects that may qualify as SEPs, procedures for calculating the cost of the SEP, and the percentage of that cost which may be applied as a mitigating factor in establishing an appropriate settlement amount. EPA should ensure that the inclusion of any SEP in settlement of an enforcement action is consistent with the SEP Policy in effect at the time of the settlement. Examples of potential SEPs are listed in Appendix D.

[45] See, Footnote 6. Please consult the current document for any additional or more recent guidance or requirement for consultation or concurrence.
[46] See, Appendix C for links to SEP Policies.

APPENDICES

Appendix A Violations and Circumstance Levels

CIRCUMSTANCE LEVEL

[48]Circumstance Level	Rule Violation
Section I Information Distribution Requirements	
Level 1b	1-Renovation in Dwelling Unit: Failure to provide the owner of the unit with the EPA-approved lead hazard information pamphlet pursuant to 40 C.F.R. § 745.84(a)(1)
Level 1b	2-Renovation in Dwelling Unit: Failure to provide the adult occupant of the unit (if not the owner) with the EPA-approved lead hazard information pamphlet pursuant to 40 C.F.R. § 745.84(a)(2)
Level 1b	3-Renovation in Common Area: Failure to provide the owner of the multi-family housing with the EPA-approved lead hazard information/pamphlet or to post informational signs pursuant to 40 C.F.R. § 745.84(b)(1)
Level 1b	4-Renovation in Common Area: Failure to notify in writing, or ensure written notification of, each unit of the multi-family housing and make the pamphlet available upon request prior to the start of the renovation, or to post informational signs pursuant to 40 C.F.R. §745.84(b)(2)
Level 1b	5-Renovation in Child-Occupied Facility: Failure to provide the owner of the building in which the child-occupied facility is located with the EPA-approved lead hazard information pamphlet pursuant to 40 C.F.R. §745.84(c)(1)(*i*)
Level 1b	6-Renovation in Child-Occupied Facility: Failure to provide an adult representative of the child-occupied facility with the pamphlet, if the owner is not the operator of the child-occupied facility, pursuant to 40 C.F.R. §745.84(c)(1)(*ii*)
Level 1b	7-Renovation in Child-Occupied Facility: Failure to provide the parents and/or guardians of children using the child-occupied facility with the pamphlet and information describing the general nature and locations of the renovation and the anticipated completion date, by mailing or hand-delivering the pamphlet and renovation information, or by posting informational signs describing the general nature and locations of the renovation and the anticipated completion date, posted in areas where they can be seen by parents or guardians of the children frequenting the child-occupied facility, and accompanied by a posted copy of the pamphlet or information on how interested parents or guardians can review a copy of the pamphlet or obtain a copy from the renovation firm at no cost to the parents or guardians, pursuant to 40 C.F.R. §745.84(c)(2)
Level 1b	8-All Renovations: Failure of firms to post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area; to prepare, to the extent practicable, signs in the primary language of the occupants; and/or to post signs before beginning the renovation and make sure they remain in place and readable until the renovation and the post-renovation cleaning verification have been completed, pursuant to 40 C.F.R. §745.85 (1).
Section II Test Kits	
Level 1a	1-All Renovations: Failure to use an EPA approved dust test kit when determining the presence of lead, pursuant to 40 C.F.R. §745.88 where the test kit result provided a false negative result for lead (i.e., no lead)
Level 5a	2-All Renovations: Failure to use an EPA approved dust test kit when determining the presence of lead, pursuant to 40 C.F.R. §745.88 where the test kit provided an accurate result for the presence of lead

[48] The matrices in Appendix A on pages B-1 through B-9 contain 2 tiers. Circumstance Level "b" is for PRE Rule requirements which are "hazard assessment" in Nature. Circumstance Level "a" is for LBP Activities Rule and RRP Rule requirements which are "chemical control" in Nature, and all combinations of "a" and "b" violations.

Appendix A Violations and Circumstance Levels

[48]Circumstance Level	Rule Violation
Section III Failure to Allow Access to Records, or Refusal of An Inspection	
Level 2a	1-All Renovations: Failure or refusal to permit entry or inspection, pursuant to 40 C.F.R. §745.87(c), which states that such failure or refusal to permit entry or inspection is also a violation of TSCA §15 and TSCA §409
Level 2a	2-Target Housing and Child-occupied Facilities: Failure or refusal to permit entry or inspection, pursuant to 40 C.F.R. §745.235(c), as required by §745.237 and section 11 of TSCA (15 U.S.C. § 2610) is a prohibited act under sections 15 and 409 of TSCA (15 U.S.C. § 2614, 2689)
Section IV Failure to Establish and Maintain Records, Failure or Refusal to Make Records Available	
Level 3a	1-All Renovations: Failure or refusal to establish and maintain records, or to make available such records, pursuant to 40 C.F.R. §745.87(b), which states that such failure or refusal is a violation of TSCA§409
Level 3a	2-Target Housing and Child-occupied Facilities: Failure or refusal to establish maintain, provide, copy, or permit access to records or reports, pursuant to 40 C.F.R. §745.225, § 745.226, and/or §745.227
Section V Acknowledgment and Certification Statement Requirements	
Level 4b	1-Renovation in Dwelling Unit: Failure to obtain, from the owner, a written acknowledgment that the owner has received the pamphlet, pursuant to 40 C.F.R. § 745.84(a)(1)(i) or failure to obtain a certificate of mailing at least 7 days prior to the renovation, pursuant to 40 C.F.R. § 745.84(a)(1)
Level 4b	2-Renovation in Dwelling Unit: Failure to obtain, from the adult occupant, a written acknowledgment that the adult occupant has received the pamphlet, pursuant to 40 C.F.R. § 745.84(a)(2)(i) or failure to obtain a certificate of mailing at least 7 days prior to the renovation, pursuant to 40 C.F.R. § 745.84(a)(2)
Level 4b	3-Renovation in Common Area: Failure to obtain, from the owner, a written acknowledgment that the owner has received the pamphlet, or that information signs have been posted, pursuant to 40 C.F.R. § 745.84(b)(1)(i) or failure to obtain a certificate of mailing at least 7 days prior to the renovation, pursuant to 40 C.F.R. § 745.84(b)(1)
Level 4b	4-Renovation in Common Area: Failure to prepare, sign, and date a statement describing the steps performed to notify all occupants of the intended renovation activities and to provide the pamphlet, pursuant to 40 C.F.R. §745.84(b)(3)
Level 5b	5-Renovation in Common Area: Failure to notify, in writing, the owners and occupants if the scope, locations or expected starting and ending dates of the planned renovation activities change after the initial notification, before the renovator initiates work beyond that which was described in the original notice, pursuant to 40 C.F.R. § 745.84(b)(4)
Level 4b	6-Renovation in Child-Occupied Facility: Failure to obtain, from the owner of the building, a written acknowledgment that the owner has received the pamphlet, or failure to obtain a certificate of mailing at least 7 days prior to the renovation, pursuant to 40 C.F.R. §745.84(c)(1)(*i*)
Level 4b	7-Renovation in Child-Occupied Facility: Failure to obtain from an adult representative of the child-occupied facility, if the operator of the child-occupied facility is not the owner of the building, a written acknowledgment that the operator has received the pamphlet, or failure to obtain a certificate of mailing at least 7 days prior to the renovation, pursuant to 40 C.F.R. § 745.84(c)(1)(*ii*)
Level 4b	8-Renovation in Child-Occupied Facility: Failure to prepare, sign and date a statement describing the steps performed to notify all parents and guardians of the intended renovation activities and to provide the pamphlet pursuant to 40 C.F.R. §745.84(c)(3)
Level 5b	9-All Renovations: Failure to include a statement recording the owner or occupant's name and acknowledging receipt of the pamphlet prior to the start of the renovation, the address of the unit undergoing renovation, the signature of the owner or occupant as applicable, and the date of signature, pursuant to 40 C.F.R. § 745.84(d)(1)
Level 5b	10-All Renovations: Failure to provide the written acknowledgment of receipt on either a separate sheet or as part of any written contract or service agreement for the renovation, and be written in the same language as the text of the contract or agreement or lease or pamphlet, pursuant to 40 C.F.R. § 745.84(d)(2) and (3)

Appendix A Violations and Circumstance Levels

[48]Circumstance Level	Rule Violation
Section VI Record Retention Requirements	
Level 6a	1-All Renovations: Failure to retain all records necessary to demonstrate compliance with the residential property renovation for a period of 3 years following completion of the renovation activities pursuant to 40 C.F.R. § 745.86
Level 6a	2-All Renovations: Failure of a training program to maintain and make available to EPA upon request, records for a period of 3 years and 6 months, pursuant to 40 C.F.R. § 745.225 (i)
Level 6a	3-Target Housing and Child-occupied Facilities: Failure or refusal to establish, maintain, provide, copy, or permit access to records or reports as required by §§745.225, 745.226, or 745.227, pursuant to 40 C.F.R. § 745.235 (b)
Section VII Renovation Firm, Renovator and Dust Sampling Technician Certifications and Requirements	
Level 3a[49]	1-All Renovations: Failure of a firm that performs, offers or claims to perform renovations or dust sampling for compensation to obtain initial certification from EPA, under to 40 C.F.R. §745.89(a) pursuant to 40 CFR § 745.81(a)(2)(ii)
Level 5a	2-All Renovations: Failure of an EPA-certified firm to stop renovations or dust sampling if it does not obtain recertification under 40 CFR § 745.89(a), pursuant to 40 C.F.R. §745.89(b)(1)(iii)
Level 5a	3-All Renovations: Failure of an EPA-certified firm to amend its certification within 90 days of the date a change occurs to information included in the firm's most recent applications, pursuant to 40 C.F.R. §745.89(b). Failure of a firm to halt renovations or dust sampling until its certification is amended, pursuant to 40 C.F.R. §745.89(c)
Level 3a	4-All Renovations: Failure of a firm to carry out its responsibilities during a renovation, under 40 C.F.R. §745.89(d)(1) pursuant to 40 C.F.R. §745.81(a)(2)
Level 3a	5-All Renovations: Failure of a firm to carry out its responsibilities during a renovation, under 40 C.F.R. §745.89(d)(2) pursuant to 40 C.F.R. §745.81(a)(2)
Level 3a	6-All Renovations: Failure of a renovator or dust sampling technician, performing renovator or dust sampling responsibilities under 40 C.F.R. § 745.90(b) or (c) to obtain a course completion certificate (proof of certification) under 40 CFR § 745.90(a)), pursuant to 40 C.F.R. §745.81(a)(3)
Level 4a	7-All Renovations: Failure of a renovator or dust sampling technician, performing renovator or dust sampling responsibilities under 40 C.F.R. § 745.90(b) or (c) to maintain copies of their course completion certificate(s) (proof of certification) at the work site pursuant to 40 CFR § 745.90(b)(7)
Level 1a	8-All Renovations: Failure of an individual to perform responsibilities for ensuring compliance with 40 C.F.R. §745.85 at all renovations to which they are assigned, pursuant to 40 C.F.R. § 745.90(b) or (c)
Level 1a	9-All Renovations: Failure of a dust sampling technician to perform optional dust clearance sampling under §745.85(c), pursuant to 40 C.F.R. § 745.90(c)
Level 5a	10-Target Housing and Child-occupied Facilities: Failure of an EPA-certified individual to stop directing renovations if he or she does not obtain recertification under 40 CFR § 745.90(a)(4), pursuant to 40 C.F.R. §745.81(a)(3)
Level 5a	11-Target Housing and Child-occupied Facilities: Failure of an EPA-certified individual to stop renovations or dust sampling if he or she does not obtain recertification under 40 CFR § 745.90(a)(4), pursuant to 40 C.F.R. §745.81(a)(4)
Section VIII Training Providers: Accreditation and Operation of Training Programs	
Level 3a	1-Target Housing and Child-occupied Facilities: Failure of a training program that performs, offers or claims to provide EPA-accredited lead-based paint activities courses, or renovator or dust sampling courses to apply for accreditation to EPA under 40 CFR §745.225(b) and receive accreditation from EPA under 40 CFR § 225(b)(2) pursuant to 40 CFR § 745.225(a)(3)

[49] For a self-employed renovator or very small firm (<4 employees), the "Extent" category is usually "minor" for "offering to perform" renovations. For larger firms, such as those acting as general contractors, the "Extent" category is usually "major" because the potential impact is greater in the number and size of renovations.

Appendix A Violations and Circumstance Levels

[48]Circumstance Level	Rule Violation
Level 3a	2-Target Housing and Child-occupied Facilities: Failure by a training program to employ a training manager who has the requisite experience, education, and/or training, pursuant to 40 C.F.R. §745.225 (c)(1)
Level 3a	3-Target Housing and Child-occupied Facilities: Failure by a training program to designate a qualified principal instructor for each course who has the requisite experience, education, and/or training, pursuant to 40 C.F.R. §745.225(c)(2)
Level 3a	4-Target Housing and Child-occupied Facilities: Failure of a training program's principal instructor and/or training manager to perform the assigned responsibilities, pursuant to 40 C.F.R. §745.225(c)(3)
Level 6a	5-Target Housing and Child-occupied Facilities: Failure of a training program to submit or retain the EPA-recognized documents as evidence that the training managers and principal instructors have the education, work experience, training requirements, or demonstrated experience, pursuant to 40 C.F.R. §745.225(c)(4)
Level 5a	6-Target Housing and Child-occupied Facilities: Failure of a training program to ensure the availability of, and provide adequate facilities for, the delivery of the lecture, course test, hands-on training, and assessment activities, including the provision of training equipment that reflects current work practices and maintaining or updating the equipment and facilities as needed, pursuant to 40 C.F.R. §745.225(c)(5)
Level 3a	7-Target Housing and Child-occupied Facilities: Failure of a training program to provide the training courses that meet the training hour requirements to ensure accreditation in the relevant disciplines, pursuant to 40 C.F.R. §745.225(c)(6)
Level 4a	8-Target Housing and Child-occupied Facilities: Failure of a training program to conduct either a course test at the completion of the course, and if applicable, a hands-on skills assessment, or in the alternative, a proficiency test for that discipline to evaluate successful completion of the course, pursuant to 40 C.F.R. §745.225(c)(7)
Level 6a	9-Target Housing and Child-occupied Facilities: Failure of a training program to issue unique course completion certificates containing the required information to each individual who passes the training course, pursuant to 40 C.F.R. §745.225(c)(8)
Level 5a	10-Target Housing and Child-occupied Facilities: Failure of a training program to develop and implement a quality control plan that contains at least the minimum elements, pursuant to 40 C.F.R. §745.225(c)(9)
Level 3a	Target Housing and Child-occupied Facilities: Failure of a training program to ensure that courses offered by the training program teach the work practice standards contained in §745.85 or §745.227, as applicable, in such a manner that trainees are provided with the knowledge needed to perform the renovations or lead-based paint activities they will be responsible for conducting, pursuant to 40 C.F.R. §745.225(c)(10)
Level 3a	11-Target Housing and Child-occupied Facilities: Failure of a training manager to allow EPA to audit the training program to verify the contents of the application for accreditation as described in paragraph (b) of 40 C.F.R. §745.225, pursuant to 40 C.F.R. §745.225(c)(12)
Level 6a	12-Target Housing and Child-occupied Facilities: Failure of a training manager to provide notification of renovator, dust sampling technician, or renovator, dust sampling technician, or lead-based paint activities offered, pursuant to 40 C.F.R. §745.22 (c)(13)
Level 6a	13-Target Housing and Child-occupied Facilities: Failure by training manager to provide EPA with notification of all lead-based paint activities courses offered at least 7 business days prior to the start date of any lead-based paint activities course, pursuant to 40 C.F.R. §745.225(c)((13)(i)
Level 5a	14-Target Housing and Child-occupied Facilities: Failure of a training manager to provide notification following completion of renovator, dust sampling technician, or lead-based paint activities courses, pursuant to 40 C.F.R. §745.225(c)(14)
Level 3a	15-Target Housing and Child-occupied Facilities: Failure by a training program to meet the minimum training curriculum requirements for each of the disciplines, pursuant to 40 C.F.R. §745.225(d)

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[48]Circumstance Level	Rule Violation
Section IX Work Practice Standards for Conducting Renovations in Target Housing and Child-Occupied Facilities	
Level 2a	1-Interior Renovations: Failure by the renovation firm 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, pursuant to 40 C.F.R. §745.85(a)(2)(i)(A)
Level 2a	2-Interior Renovations: Failure by the renovation firm, before beginning the renovation, to close and cover all ducts opening in the work area with taped-down plastic sheeting or other impermeable material, pursuant to 40 C.F.R. §745.85(a)(2)(i)(B)
Level 2a	3-Interior Renovations: Failure by the renovation firm to close windows and doors in the work area, cover doors with plastic sheeting or other impermeable material, and/or cover doors used as an entrance to the work 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, pursuant to 40 C.F.R. §745.85(a)(2)(i)(C)
Level 2a	4-Interior Renovations: Failure by the renovation firm, before beginning the renovation, to cover the floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area 6 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater, pursuant to 40 C.F.R. §745.85(a)(2)(i)(D)
Level 2a	5-Interior Renovations: Failure by the renovation firm to use precautions to ensure that all personnel, tools, and other items, including the exteriors of containers of waste, are free of dust and debris before leaving the work area, pursuant to 40 C.F.R. §745.85(a)(2)(i)(E)
Level 2a	6-Exterior Renovations: Failure by the renovation firm, before beginning the renovation, to close all doors and windows within 20 feet of the renovation, close all doors and windows within 20 feet of the renovation on the same floor as the renovation on multi-story buildings, and/or close all doors and windows on all floors below that are the same horizontal distance from the renovation, pursuant to 40 C.F.R. §745.85(a)(2)(ii)(A)
Level 2a	7-Exterior Renovations: Failure by the renovation firm, before beginning the renovation, to ensure that doors within the work area that will be used while the job is being performed are 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, pursuant to 40 C.F.R. §745.85(a)(2)(ii)(B)
Level 2a	8-Exterior Renovations: Failure by the renovation firm, before beginning the renovation, to cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering, pursuant to 40 C.F.R. §745.85(a)(2)(ii)(C)
Level 2a	9-Exterior Renovations: Failure by the renovation firm, before beginning the renovations in certain situations, to take extra precautions in containing the work area to ensure that dust and debris from the renovation does not contaminate other buildings or other areas of the property or migrate to adjacent properties, pursuant to 40 C.F.R. §745.85(a)(2)(ii)(D)
Level 1a	10-Prohibited and restricted practices: Failure to prohibit the use of open-flame burning or torching of lead-based paint during renovations, pursuant to 40 C.F.R. §745.85(a)(3)(i)
Level 1a	11-Prohibited and restricted practices: Failure to prohibit the use of machines that remove lead-based paint through high speed operation such as sanding, grinding, power planning, needle gun, abrasive blasting, or sandblasting, unless such machines are used with HEPA exhaust control, pursuant to 40 C.F.R. §745.85(a)(3)(ii)
Level 1a	12-Prohibited and restricted practices: Failure to restrict the operating of a heat gun on lead-based paint to temperatures below 1100 degrees Fahrenheit, pursuant to 40 C.F.R. §745.85(a)(3)(iii)
Level 2a	Waste from renovations: Failure 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 and/or failure to cover a chute if it is used to remove waste from the work area, pursuant to 40 C.F.R. §745.85(a)(4)(i)

Appendix A Violations and Circumstance Levels

[48]Circumstance Level	Rule Violation
Level 2a	13-Waste from renovations: Failure at the conclusion of each work day and/or at the conclusion of the renovation, to ensure that waste that has been collected from renovation activities was 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, pursuant to 40 C.F.R. §745.85(a)(4)(ii)
Level 2a	14-Waste from renovations: Failure by the renovation firm to contain the waste to prevent release of dust and debris during the transport of waste from renovation activities, pursuant to 40 C.F.R. §745.85(a)(4)(iii)
Level 1a	15-Cleaning the work area: Failure by the renovation firm to clean the work area until no dust, debris or residue remains after the renovation has been completed, pursuant to 40 C.F.R. §745.85(a)(5)
Level 1a	16-Cleaning the work area: Failure by the renovation firm to collect all paint chips and debris and seal the material in a heavy-duty bag without dispersing any of it, pursuant to 40 C.F.R. §745.85(a)(5)(i)(A)
Level 1a	17-Cleaning the work area: Failure by the renovation firm to remove the protective sheeting by misting the sheeting before folding it, folding the dirty side inward, and/or either taping shut to seal or sealing it in heavy-duty bags, pursuant to 40 C.F.R. §745.85(a)(5)(i)(B)
Level 1a	18-Cleaning the work area: Failure by the renovation firm to keep in place the plastic sheeting used to isolate contaminated rooms from non-contaminated rooms until after the cleaning and removal of other sheeting, pursuant to 40 C.F.R. §745.85(a)(5)(i)(B)
Level 1a	19-Cleaning the work area: Failure by the renovation firm to dispose of the plastic sheeting, used as occupant protection at the renovation site, as waste, pursuant to 40 C.F.R. §745.85(a)(5)(i)(B).
Level 1a	20-Cleaning the work area: Failure by the renovation firm to clean all objects and surfaces in the work area and within 2 feet of the work area, cleaning from higher to lower, pursuant to 40 C.F.R. §745.85(a)(5)(ii)
Level 1a	21-Cleaning the work area: Failure by the renovation firm to clean walls in the work area, starting at the ceiling and working down to the floor, by either vacuuming with a HEPA vacuum or wiping with a damp cloth, pursuant to 40 C.F.R. §745.85(a)(5)(ii)(A)
Level 1a	22-Cleaning the work area: Failure by the renovation firm to thoroughly vacuum all remaining surfaces and objects in the work area, including furniture and fixtures, with a HEPA vacuum and/or failure to use a HEPA vacuum equipped with a beater bar when vacuuming carpets and rugs, pursuant to 40 C.F.R. §745.85(a)(5)(ii)(B).
Level 1a	23-Cleaning the work area: Failure by the renovation firm to wipe all remaining surfaces and objects in the work area, except for carpeted or upholstered surfaces, with a damp cloth and/or failure to mop uncarpeted floors thoroughly, using a mopping method that keeps the wash water separate from the rinse water, such as the 2-bucket mopping method, or using a wet mopping system, pursuant to 40 C.F.R. §745.85(a)(5)(ii)(C)
Level 1a	24-Standards for post-renovation cleaning verification: Failure by a renovator to perform a visual inspection of the interior work area to determine whether dust, debris or residue is still present, to remove dust, debris or residue by re-cleaning if necessary, and/or perform another visual inspection, pursuant to 40 C.F.R. §745.85(b)(1)(i)
Level 1a	25-Standards for post-renovation cleaning verification: Failure by a renovator to verify that each interior windowsill in the work area has been adequately cleaned using a disposable cleaning cloth(s) compared to the cleaning verification card following the prescribed procedures, pursuant to 40 C.F.R. §745.85 (b)(1)(ii) (A) or failure by a certified renovator to arrange for the collection dust clearance samples as part of optional dust clearance testing, pursuant to 40 C.F.R. §745.85(b)(1)(ii)(A)
Level 1a	26-Standards for post-renovation cleaning verification: Failure by a renovator to verify that each interior floor in the work area has been adequately cleaned using a disposable cleaning cloth(s) compared to the cleaning verification card following the prescribed procedures pursuant to 40 C.F.R. §745.85 (b)(1)(ii) (B) or failure by a certified renovator to arrange for the collection dust clearance samples as part of optional dust clearance testing, pursuant to 40 C.F.R. §745.85(b)(1)(ii)(B)
Level 1a	27-Standards for post-renovation cleaning verification: Failure by a renovator to wait until interior work area passes post-renovation cleaning verification before removing signs, pursuant to 40 C.F.R. §745.85(b)(1)(iii)

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[48]Circumstance Level	Rule Violation
Level 1a	28-Standards for post-renovation cleaning verification: Failure by a renovator to perform a visual inspection of the exterior work area to determine whether dust, debris or residue is still present, to remove dust, debris or residue by re-cleaning if necessary, and/or perform another visual inspection, pursuant to 40 C.F.R. §745.85(b)(2)
Level 1a	29-Standards for post-renovation cleaning verification: Failure by a renovator to wait until exterior work area passes visual inspection before removing signs, pursuant to 40 C.F.R. §745.85(b)(2)
Level 1a	30-Standards for post-renovation cleaning verification: Failure by a renovation firm to arrange for the performance of optional dust clearance testing at the conclusion of the renovation if required to do so by the person contracting for the renovation, a Federal, State, Territorial, Tribal, or local law or regulation, pursuant to 40 C.F.R. §745.85(c)
Level 1a	31-Standards for post-renovation cleaning verification: Failure to have the optional dust clearance testing performed by a certified inspector, risk assessor or dust sampling technician at the conclusion of the renovation, pursuant to 40 C.F.R. §745.85(c)(2)
Level 1a	32-Standards for post-renovation cleaning verification: Failure by a renovation firm to re-clean the work area until dust clearance results are below clearance standards, pursuant to 40 C.F.R. §745.85(c)(3)
Section X Work Practice Standards for Conducting Lead-Based Paint Activities in Target Housing and Child-Occupied Facilities	
Level 1a	1-Target Housing and Child-occupied Facilities: Failure to perform all lead-based paint activities pursuant to the work practice standards, appropriate requirements, methodologies and clearance levels specified and referenced, pursuant to 40 C.F.R. §745.227(a)(1)
Level 2a	2- Target Housing and Child-occupied Facilities: Failure to ensure that a lead-based paint activity described by the certified individual as an inspection, lead-hazard screen, risk assessment or abatement, is performed by a certified individual in compliance with the appropriate requirements, pursuant to 40 C.F.R. §745.227(a)(2)
Level 2a	3-Target Housing and Child-occupied Facilities: Failure to ensure that an inspection is conducted only by a person certified by EPA as an inspector or risk assessor and, if conducted, must be conducted according to the prescribed procedures, pursuant to 40 C.F.R. §745.227(b)(1)
Level 1a	4-Target Housing and Child-occupied Facilities: Failure in an inspection to select locations according to documented methodologies to be tested for the presence of lead-based paint, pursuant to 40 C.F.R. §745.227(b)(2)
Level 3a	5-Target Housing and Child-occupied Facilities: Failure to test for lead-based paint each interior and/or exterior component with a distinct painting history in a residential dwelling and/or child-occupied facility, pursuant to 40 C.F.R. §745.227(b)(2)(i)
Level 3a	6-Target Housing and Child-occupied Facilities: Failure to test for lead-based paint each interior and/or exterior component with a distinct painting history in a multi-family dwelling, pursuant to 40 C.F.R. §745.227(b)(2)(ii)
Level 5a	7-Target Housing and Child-occupied Facilities: Failure to ensure that paint sampled for analysis to determine the presence of lead was conducted using documented methodologies which incorporate adequate quality control procedures, pursuant to 40 C.F.R. §745.227(b)(3)(i)
Level 3a	8- Target Housing and Child-occupied Facilities: Failure to ensure that all collected paint chip samples were analyzed according to 40 C.F.R. §745.227(f) to determine if they contain detectable levels of lead that can be quantified numerically, pursuant to 40 C.F.R. §745.227(b)(3)(ii)
Level 3a	9- Target Housing and Child-occupied Facilities: Failure of an inspector or risk assessor to prepare an inspection report that includes the required information, pursuant to 40 C.F.R. §745.227(b)(4)
Level 2a	10-Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen is conducted only by a person certified by EPA as a risk assessor, pursuant to 40 C.F.R. §745.227(c)(1)
Level 3a	11- Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes the collection of background information regarding the physical characteristics of the residential dwelling or child-occupied facility and occupant use patterns that may cause lead-based paint exposure to one or more children age 6 years and under, pursuant to 40 C.F.R. §745.227(c)(2)(i)

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[48]Circumstance Level	Rule Violation
Level 3a	12-Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes a visual inspection to determine the presence of deteriorated paint, pursuant to 40 C.F.R. §745.227(c)(2)(ii)(A)
Level 3a	13-Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes a visual inspection to locate at least two dust samples performed according to the prescribed methodologies, pursuant to 40 C.F.R. §745.227(c)(2)(ii)(B)
Level 3a	14- Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes the collection and analysis of dust samples according to the prescribed methodologies, pursuant to 40 C.F.R. §745.227(c)(3)
Level 3	15-Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes the collection and analysis of paint samples according to the prescribed methodologies, pursuant to 40 C.F.R. §745.227(c)(4)
Level 3a	16-Target Housing and Child-occupied Facilities: Failure of a risk assessor to prepare a lead hazard screen report that includes the required information, pursuant to 40 C.F.R. §745.227(c)(5)
Level 3a	17-Target Housing and Child-occupied Facilities: Failure to ensure that a risk assessment is conducted only by a person certified by EPA as a risk assessor, pursuant to 40 C.F.R. §745.227(d)(1)
Level 3a	8-Target Housing and Child-occupied Facilities: Failure to ensure that a risk assessment includes a visual inspection of the residential dwelling or child-occupied facility to locate the existence of deteriorated paint, assess the extent and causes of the deterioration, and other potential lead-based paint hazards, pursuant to 40 C.F.R. §745.227(d)(2)
Level 3a	19-Target Housing and Child-occupied Facilities: Failure to ensure that a lead hazard screen includes the collection of background information regarding the physical characteristics of the residential dwelling or child-occupied facility and occupant use patterns that may cause lead-based paint exposure to one or more children age 6 years and under, pursuant to 40 C.F.R. §745.227(d)(3)
Level 3a	20-Target Housing and Child-occupied Facilities: Failure to test for the presence of lead on each surface determined to have a distinct painting history, pursuant to 40 C.F.R. §745.227(d)(4)
Level 3a	21-Residential Dwellings: Failure to collect and analyze for lead concentration dust samples (either composite or single-surface samples) from the interior window sill(s) and floor(s) in all living areas where one or more children, age 6 and under, are most likely to come into **c**ontact with dust, pursuant to 40 C.F.R. §745.227(d)(5)
Level 3a	22-Multi-family Dwellings and Child-occupied Facilities: Failure to collect and analyze interior window sill and floor dust samples (either composite or single-surface samples) for lead concentration from the prescribed locations, pursuant to 40 C.F.R. §745.227(d)(6)
Level 3a	23-Child-occupied Facilities: Failure to collect and analyze interior window sill and floor dust samples (either composite or single-surface samples) for lead concentration in each room, hallway or stairwell utilized by one or more children, age 6 and under, and in other common areas in the child-occupied facility pursuant to 40 C.F.R. §745.227(d)(7)
Level 3a	24-Target Housing and Child-occupied Facilities: Failure to collect and analyze soil samples for lead concentrations in the prescribed locations, pursuant to 40 C.F.R. §745.227(d)(8)
Level 3a	25-Target Housing and Child-occupied Facilities: Failure to conduct all paint, dust, or soil sampling or testing using documented methodologies that incorporate adequate quality control procedures, pursuant to 40 C.F.R. §745.227(d)(9)
Level 3a	26-Target Housing and Child-occupied Facilities: Failure to analyze any collected paint chip, dust, or soil samples according to 40 C.F.R. §745.227(f) to determine if they contain detectable levels of lead that can be quantified numerically, pursuant to 40 C.F.R. §745.227(d)(10)
Level 3a	27-Target Housing and Child-occupied Facilities: Failure of risk assessor to prepare a risk assessment report that includes the required information, pursuant to 40 C.F.R. §745.227(d)(11)
Level 1a	28-Target Housing and Child-occupied Facilities: Failure to ensure that an abatement is conducted only by a person certified by EPA, and, if conducted, is conducted according to the prescribed procedures, pursuant to 40 C.F.R. §745.227(e)(1)

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[48]Circumstance Level	Rule Violation
Level 3a	29- Target Housing and Child-occupied Facilities: Failure of a supervisor to be onsite for each abatement project during all work site preparation, during the post-abatement cleanup of work areas, and to be onsite at other times during the abatement or available by telephone, pager or answering service and able to be present at the work site in no more than 2 hours, pursuant to 40 C.F.R. §745.227(e)(2)
Level 3a	30- Target Housing and Child-occupied Facilities: Failure of a supervisor and the certified firm employing that supervisor to ensure that all abatement activities are conducted according to the requirements of 40 C.F.R. §745.227(e) and all other Federal, State and local requirements, pursuant to 40 C.F.R. §745.227(e)(3)
Level 3a	31-Target Housing and Child-occupied Facilities: Failure of a renovation firm to notify EPA of lead-based paint abatement activities or to update notification as prescribed and by the designated deadline, pursuant to 40 C.F.R. §745.227(e)(4)(i-v)
Level 3a	32-Target Housing and Child-occupied Facilities: Failure of a renovation firm to include the designated information in each notification, pursuant to 40 C.F.R. §745.227(e)(4)(vi)
Level 2a	33-Target Housing and Child-occupied Facilities: Failure by a certified firm to accomplish written or electronic notification via one of the prescribed methods, pursuant to 40 C.F.R. §745.227(e)(4)(vii)
Level 4a	34-Target Housing and Child-occupied Facilities: Failure of a renovation firm to begin lead-based paint abatement activities on the date and at the location specified in either the original or updated notification, pursuant to 40 C.F.R. §745.227(e)(4)(viii)
Level 2a	35-Target Housing and Child-occupied Facilities: Failure of a renovation firm or individual to notify EPA before engaging in lead-based paint abatement activities defined in 40 C.F.R. §745.223, pursuant to 40 C.F.R. §745.227(e)(4)(ix)
Level 3a	36-Target Housing and Child-occupied Facilities: Failure of a renovation firm or individual to develop a written occupant protection plan for all abatement projects and in accordance with the prescribed procedures, pursuant to 40 C.F.R. §745.227(e)(5)
Level 2a	37-Target Housing and Child-occupied Facilities: Failure to prohibit the use of open-flame burning or torching of lead-based paint during abatement activities pursuant to 40 C.F.R. §745.227(e)(6)(i)
Level 2a	38-Target Housing and Child-occupied Facilities: Failure to prohibit the use of machines that remove lead-based paint through sanding, grinding, abrasive blasting, or sandblasting, unless such machines are used with HEPA exhaust control which removes particles of 0.3 microns or larger from the air at 99.97 percent or greater efficiency, pursuant to 40 C.F.R. §745.227(e)(6)(ii)
Level 2a	39-Target Housing and Child-occupied Facilities: Failure to prohibit the dry scraping of lead-based paint unless it is used in conjunction with heat guns or around electrical outlets or when treating defective paint spots totaling no more than 6 square feet in any one room, hallway, or stairwell or totaling no more than 20 square feet on exterior surfaces, pursuant to 40 C.F.R. §745.227(e)(6)(iii)
Level 2a	40-Target Housing and Child-occupied Facilities: Failure to restrict the operating of a heat gun on lead-based paint at temperatures below 1100 degrees Fahrenheit, pursuant to 40 C.F.R. §745.227(e)(6)(iv)
Level 3a	41-Target Housing and Child-occupied Facilities: Failure to conduct soil abatement, when necessary, according to the prescribed methods, pursuant to 40 C.F.R. §745.227(e)(7)
Level 3a	42-Target Housing and Child-occupied Facilities: Failure to have a certified inspector or risk assessor perform the post-abatement clearance procedures, pursuant to 40 C.F.R. §745.227(e)(8)
Level 3a	43-Target Housing and Child-occupied Facilities: Failure by an inspector or risk assessor to perform a visual inspection after abatement to determine if deteriorated painted surfaces and/or visible amounts of dust, debris or residue are still present and to remove any hazards that still remain, pursuant to 40 C.F.R. §745.227(e)(8)(i)
Level 4a	44-Target Housing and Child-occupied Facilities: Failure to wait until the required visual inspection and any necessary post-abatement cleanups are completed before performing clearance sampling for lead in dust, pursuant to 40 C.F.R. §745.227(e)(8)(ii)
Level 1a	45-Target Housing and Child-occupied Facilities: Failure to take dust samples for clearance purposes using documented methodologies that incorporate adequate quality control procedures, pursuant to 40 C.F.R. §745.227(e)(8)(iii)

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[48]Circumstance Level	Rule Violation
Level 4a	46-Target Housing and Child-occupied Facilities: Failure to wait a minimum of 1 hour after completion of final post-abatement cleanup activities to collect dust samples for clearance purposes, pursuant to 40 C.F.R. §745.227(e)(8)(iv)
Level 4a	47-Target Housing and Child-occupied Facilities: Failure to collect the required dust samples from the prescribed surfaces in the designated rooms after conducting an abatement with containment between abated and unabated areas, pursuant to 40 C.F.R. §745.227(e)(8)(v)(A)
Level 4a	48-Target Housing and Child-occupied Facilities: Failure to collect the required dust samples from the prescribed surfaces in the designated rooms after conducting an abatement with no containment, pursuant to 40 C.F.R. §745.227(e)(8)(v)(B)
Level 4a	49-Target Housing and Child-occupied Facilities: Failure to conduct a visual inspection and clean horizontal, outdoor surfaces of visible dust and debris, perform visual inspection for paint chips on the dripline and remove and properly dispose of any paint chips found following an exterior paint abatement, pursuant to 40 C.F.R. §745.227(e)(8)(v)(C)
Level 4a	50-Target Housing and Child-occupied Facilities: Failure to select the rooms, hallways or stairwells for sampling according to documented methodologies, pursuant to 40 C.F.R. §745.227(e)(8)(vi)
Level 3a	51-Target Housing and Child-occupied Facilities: Failure by an inspector or risk assessor to compare the residual lead level from dust samples with clearance levels to determine if level exceeds the applicable clearance level, pursuant to 40 C.F.R. §745.227(e)(8)(vii)
Level 2a	52-Target Housing and Child-occupied Facilities: Failure by an inspector or risk assessor to reclean and retest the surface of components that were determined to have failed clearance testing after abatement, pursuant to 40 C.F.R. §745.227(e)(8)(vii)
Level 3a	53-Target Housing and Child-occupied Facilities: Failure to use the standard clearance levels for lead in dust of 40 µg/ft2 for floors, 250 µg/ft2 for interior window sills, and 400 µg/ft2 for window troughs to determine if a level in a sample exceeds the applicable clearance level, pursuant to 40 C.F.R. §745.227(e)(8)(viii)
Level 4a	54-Target Housing and Child-occupied Facilities: Failure to perform random sampling in a multi-family dwelling with similarly constructed and maintained residential dwellings according to the prescribed methods, pursuant to 40 C.F.R. §745.227(e)(9)
Level 4a	55-Target Housing and Child-occupied Facilities: Failure by a supervisor or project designer to prepare an abatement report that includes the required information, pursuant to 40 C.F.R. §745.227(e)(10)
Level 3a	56-Target Housing and Child-occupied Facilities: Failure to ensure that all paint chip, dust, or soil samples obtained are collected by a certified risk assessor or paint inspector and analyzed by an EPA-recognized laboratory, pursuant to 40 C.F.R. §745.227(f)
Level 5a	57-Target Housing and Child-occupied Facilities: Failure to limit composite dust sampling to only those situations specified, pursuant to 40 C.F.R. §745.227(g)
Level 3a	58-Target Housing and Child-occupied Facilities: Failure to make a determination on the presence of lead-based paint, pursuant to 40 C.F.R. §745.227(h)
Level 1a	59-Target Housing and Child-occupied Facilities: Failure of a firm that performs, offers or claims to perform renovations or dust sampling for compensation to obtain initial certification from EPA, under to 40 C.F.R. §745.226 pursuant to 40 CFR § 745.233
Section XI Lead-Based Paint Risk Assessments	
Level 2a	1-Failure of a person performing a risk assessment to be certified by EPA as a risk assessor, pursuant to 40 C.F.R. §745.227(d)(1)
Level 2a	2-Failure to conduct visual inspection for risk assessment or child-occupied facility to locate existence of deteriorated paint, assess extent and causes of deterioration, and other potential lead-based paint hazards, pursuant to 40 C.F.R. §745.227(d)(2)

Appendix B Gravity-Based Penalty Matrices

GRAVITY-BASED PENALTY MATRIX FOR PRE, RRP, & LBP ACTIVITIES RULES[49]

		Extent		
		MAJOR	**SIGNIFICANT**	**MINOR**
Target Housing:		one or more occupants under age 6 and/or pregnant woman	no information about age of the youngest occupant, or one or more occupants between ages of 6 and 17	no occupants under age 18
Child-Occupied Facilities:		one or more occupants under age 6 (by definition, a child-occupied facility is regularly visited by one or more children under 6)		renovation activities were completed during a period when children did not access the facility (*e.g.,* as summer vacation) and there is no continuity of enrollment (*i.e.,* the same children are not returning after the break).[50]
For Violations Occurring On or Before 1/12/2009:[51]				
Circumstance				
HIGH	**Level 1a**	$ 32,500	$ 21,930	$ 6,500
	Level 1b	$ 11,000	$ 7,740	$ 2,580
	Level 2a	$ 25,800	$ 16,770	$ 3,870
	Level 2b	$ 10,320	$ 6,450	$ 1,550
MEDIUM	**Level 3a**	$ 19,350	$ 12,900	$ 1,940
	Level 3b	$ 7,740	$ 5,160	$ 780
	Level 4a	$ 12,900	$ 7,740	$ 1,290
	Level 4b	$ 5,160	$ 3,220	$ 520
LOW	**Level 5a**	$ 6,450	$ 3,870	$ 650
	Level 5b	$ 2,680	$ 1,800	$ 260
	Level 6a	$ 6580	$ 1,680	$ 260
	Level 6b	$ 1,290	$ 640	$ 130

[49] Since the "nature" of violations for training providers is unique, separate matrices are provided on page B3.
[50] In a situation where there is "no continuity of enrollment," there are no children's parents to whom information can be provided; therefore, information must only be provided to the owner and operator of the child-occupied facility.
[51] The maximum civil monetary penalty for TSCA is $32,500 and $11,000, respectively, for violations occurring after 3/15/2004 through 1/12/2009.

Appendix B Gravity-Based Penalty Matrices

		Extent		
		MAJOR	**SIGNIFICANT**	**MINOR**
Target Housing:		one or more occupants under age 6 and/or pregnant woman	no information about age of the youngest occupant, or one or more occupants between ages of 6 and 17	no occupants under age 18
Child-Occupied Facilities:		one or more occupants under age 6 (by definition, a child-occupied facility is regularly visited by one or more children under 6)		renovation activities were completed during a period when children did not access the facility (*e.g.*, as summer vacation) and there is no continuity of enrollment (*i.e.,* the same children are not returning after the break).[52]
For Violations Occurring After 1/12/2009:[53]				
HIGH	**Level 1a**	$ 37,500	$ 25,500	$ 7,500
	Level 1b	$ 16,000	$ 8,500	$ 2,840
	Level 2a	$ 30,000	$ 20,400	$ 6,000
	Level 2b	$ 11,340	$ 7,090	$ 1,710
MEDIUM	**Level 3a**	$ 22,500	$ 15,300	$ 4,500
	Level 3b	$ 8,500	$ 5,670	$ 850
	Level 4a	$ 15,000	$ 10,200	$ 3,000
	Level 4b	$ 5,670	$ 3,540	$ 580
LOW	**Level 5a**	$ 7,500	$ 5,100	$ 1,500
	Level 5b	$ 2,840	$ 1,850	$ 290
	Level 6a	$ 3,000	$ 2,040	$ 600
	Level 6b	$ 1,420	$ 710	$ 150

[52] In a situation where there is "no continuity of enrollment," there are no children's parents to whom information can be provided; therefore, information must only be provided to the owner and operator of the child-occupied facility.

[53] The maximum civil monetary penalty for TSCA is $37,500 and $16,000, respectively, for violations occurring after 1/12/2009. Adjustments to the individual "a" levels below the maximum were made using the ratios established in the TSCA Penalty Guidelines matrix (45 Fed. Reg. 59771, September 10, 1980).

Appendix B Gravity-Based Penalty Matrices

GRAVITY-BASED PENALTY MATRIX FOR TRAINING VIOLATIONS

		Extent		
		MAJOR	**SIGNIFICANT**	**MINOR**
Potential that the trainer's violations will affect human health by impairing the student's ability to learn:		eleven or more students attending class where violations occurred	six to ten students attending class where violations occurred	one to five students attending class where violations occurred
For Violations Occurring On or Before 1/12/2009:[54]				
Circumstance				
HIGH	**Level 1a**	$ 32,500	$ 21,930	$ 6,450
	Level 2a	$ 25,800	$ 16,770	$ 3,870
MEDIUM	**Level 3a**	$ 19,350	$ 12,900	$ 1,940
	Level 4a	$ 12,900	$ 7,740	$ 1,290
LOW	**Level 5a**	$ 6,450	$ 3,870	$ 640
	Level 6a	$ 2,580	$ 1,680	$ 260

		Extent		
		MAJOR	**SIGNIFICANT**	**MINOR**
Potential that the trainer's violations will affect human health by impairing the students ability to learn:		eleven or more students attending class where violations occurred	six to ten students attending class where violations occurred	one to five students attending class where violations occurred
For Violations Occurring After 1/12/2009:[55]				
HIGH	**Level 1a**	$ 37,500	$ 25,500	$ 7,500
	Level 2a	$ 30,000	$ 20,400	$ 6,000
MEDIUM	**Level 3a**	$ 22,500	$ 15,300	$ 4,500
	Level 4a	$ 15,000	$ 10,200	$ 3,000
LOW	**Level 5a**	$ 7,500	$ 5,100	$ 1,500
	Level 6a	$ 3,000	$ 2,040	$ 600

[54] The maximum civil monetary penalty is $32,500 for violations occurring after 3/15/2004 through 1/12/2009.
[55] The maximum civil monetary penalty is $37,500 for violations occurring after 1/12/2009. Adjustments to the individual levels below the maximum were made using the ratios established in the TSCA Penalty Guidelines matrix (45 Fed. Reg. 59771, September 10, 1980).

Appendix C Internet References for Policy Documents

The EPA website for information on the TSCA 406(b) Pre-Renovation Education Rule is:
http://www.epa.gov/lead/pubs/leadrenf.htm

The EPA website also maintains copies of applicable policies and other useful information:

EPA Home Page: http://www.epa.gov

Compliance and Enforcement Home Page: http://www.epa.gov/compliance/

TSCA Enforcement Policy and Guidance Documents:
http://cfpub.epa.gov/compliance/resources/policies/civil/tsca/

Supplemental Environmental Projects:
http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

Final Supplemental Environmental Projects Policy (1998):
http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsup-hermn-mem.pdf

Treatment of Lead-based Paint Abatement Work as a Supplemental Environmental Project in Administrative Settlements (Jan 2004):
http://www.epa.gov/compliance/resources/policies/civil/seps/leadbasedabatement-sep012204.pdf

Audit Policy: http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html

Small Business Policy:
http://www.epa.gov/compliance/incentives/smallbusiness/index.html

Redelegation of Authority:
http://www.epa.gov/compliance/resources/policies/civil/rcra/hqregenfcases-mem.pdf

HUD Technical Guidelines for the Evaluation and Control of Lead Based Paint Hazards in Housing: http://www.hud.gov/offices/lead/lbp/hudguidelines/index.cfm

Documenting Penalty Calculations and Justifications of EPA Enforcement Actions, (Aug 1990):
http://www.epa.gov/compliance/resources/policies/civil/rcra/caljus-strock-mem.pdf

Amendments to Penalty Policies to Implement Penalty Inflation Rule 2008
http://cfpub.epa.gov/compliance/resources/policies/civil/penalty/

Appendix D List of Supplemental Environmental Projects (SEPs)

The following list of potential Supplemental Environmental Projects (SEPs) is not exhaustive, but is intended to offer some examples.[56]

- Abatement of lead-based paint and/or lead-based paint hazards in target housing or child-occupied facilities in compliance with requirements of 40 C.F.R. § 227(e).

- Renovation (such as window or door replacement) that includes removal of components containing lead-based paint and/or lead-based paint hazards from target housing or child-occupied facilities, followed by clearance testing as defined in 40 C.F.R. § 227(e)(8).

- Risk assessment of target housing or child-occupied facilities to identify lead-based paint hazards, followed by correction of any hazards identified.

- Purchase of an XRF for a local health organization.

- Blood-lead level screening and/or treatment for children where Medicaid coverage is not available. (Blood-lead level screening and/or treatment for children underserved by Medicaid may also be appropriate, with approval from the Special Litigation and Projects Division in OECA.)

- Purchase and operate a mobile health clinic, including outfitting the mobile units (*e.g.*, blood lead level testing and treatment for children in public housing).

- Purchase and donate lead health screening equipment to schools, public health departments, clinics, *etc.*

- Provide free lab tests for lead in dust, soil and paint chip samples; make testing available to low-income homeowners, small rental property owners, and community-based organizations.

[56] Whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. *(See, Supplemental Environmental Projects Policy, May 1, 1998, page 3.)*

ATTACHMENT 3

Section 1018 —Disclosure Rule Enforcement Response and Penalty Policy

Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy

United States Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Office of Civil Enforcement
Waste and Chemical Enforcement Division

December 2007

Table of Contents

Chapter 1: Introduction

The revised *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* supersedes the February 2000 *Section 1018 -- Disclosure Rule Enforcement Response Policy*. It sets forth guidelines for the Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount, in settlement or in litigation, for violations of Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992. The revisions in this policy take into account an increase in the maximum statutory penalty required by the Debt Collection Improvement Act of 1996, recent case law developments and other relevant EPA policies that impact enforcement actions.

The purpose of this Enforcement Response and Penalty Policy (ERPP) is to provide predictable and consistent enforcement responses and penalty amounts for violations of Section 1018, yet retain flexibility to allow for individual facts and circumstances of a particular case.

This policy is not binding on the Agency. The policies and procedures set forth herein are intended solely for the guidance of employees of the EPA. They are not intended to, nor do they constitute a rulemaking by the EPA, nor do they impose requirements on EPA staff or the regulated community. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity by any person. Further, this document is not intended to limit the discretion of EPA staff. Enforcement staff should continue to make appropriate case-by-case enforcement judgments guided, but not restricted or limited, by the policies contained in this document.

I. Background

The Centers for Disease Control and Prevention (CDC) has established the elevated blood-lead level (EBL) of 10 micrograms per deciliter (μg/dL) to be a level of concern for children. In the early 1990s the National Health and Nutrition Examination Survey (NHANES) data indicated that there were approximately 890,000 American children with levels greater than 10 μg/dL. In addition, minority and low-income children were disproportionately affected. Lead poisoning in children causes intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems; in severe cases it may lead to seizures, coma and death. NHANES data further indicated that in as many as 4 million homes in the United States, children's health was endangered by lead-based paint and/or lead-based paint hazards. In response to this national crisis, Congress enacted *Title X: Residential Lead-Based Paint Hazard Reduction Act of 1992*, 42 United States Code (USC) Section 4851 (Title X).[1]

[1] The CDC's recent statement on *Preventing Lead Poisoning in Young Children*, August 2005, recognized that recent studies indicate that additional evidence exists of adverse health effects in children at blood lead levels of less than 10 μg/dL. However, the CDC has determined that it will not lower the level of concern at this time.

There has been significant progress in reducing the number of EBL children, as documented by the most recent NHANES data showing approximately 310,000 EBL children. CDC's Advisory Committee on Childhood Lead Poisoning Prevention updated its recommendations in 2005 and called for the nation to focus on primary prevention of childhood lead poisoning. Lead in housing remains the most significant source of lead exposure for young children. The CDC recommends the control of lead-based paint contaminated house dust and soil and poorly maintained lead-based paint in housing as the first essential element of primary prevention of lead exposure for young children.[2] Elevated blood-lead levels are totally preventable, and such prevention remains a national concern.

Pursuant to Section 1018 of Title X, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Housing and Urban Development (HUD) promulgated joint regulations for the disclosure of lead-based paint and/or lead-based paint hazards in pre-1978 housing (target housing) offered for sale or lease. These regulations were published on March 6, 1996, at 61 Fed. Reg. 9064, and are codified at Title 40 of the Code of Federal Regulations (CFR) Part 745, Subpart F and at 24 CFR Part 35, Subpart H (Disclosure Rule).

II. Enforcement Response and Penalty Policy Applicability

This *Disclosure Rule Enforcement Response and Penalty Policy* is immediately applicable and should be used to inform the appropriate enforcement response and to guide the calculation of any proposed penalties in administrative enforcement actions concerning violations of the Disclosure Rule.

III. Applicability to Federal Facilities

As discussed below, the Disclosure Rule defines seller and lessor to include government agencies. Thus, when a federal facility or government agency is the seller or lessor of target housing, as defined in the statute and the rule, the requirements of Section 1018 and the Disclosure Rule apply to such facility or agency.

Pursuant to Section 1018(b)(5), a violation of the Disclosure Rule is a prohibited act under Section 409 of TSCA and is subject to EPA enforcement authority under Section 16 of TSCA. Section 408 of TSCA, 15 USC § 2688, subjects each department, agency, and instrumentality of the executive, legislative and judicial branches of the federal government to all federal, state, interstate, and local requirements, both substantive and procedural, respecting lead-based paint, lead-based paint activities, and lead-based paint hazards. The federal, state, interstate, and local substantive and procedural requirements referred to in Section 408 of TSCA include, but are not limited to, all administrative orders and all civil and administrative penalties and fines regardless of whether such penalties or fines are punitive or coercive in nature. The Disclosure Rule contains federal requirements respecting lead-based paint, lead-based paint

[2] *Preventing Lead Poisoning in Young Children,* A Statement by the Centers for Disease Control and Prevention, Atlanta: CDC; 2005

activities, and lead-based paint hazards. Therefore, federal facilities are subject to the Disclosure Rule requirements.

In proposing penalties against federal agencies, EPA will consider the *Disclosure Rule Enforcement Response and Penalty Policy*. Before a penalty order becomes final, Section 16(a)(2) of TSCA, 15 USC § 2615(a)(2), requires the Administrator to provide the federal agency with notice and an opportunity for a formal hearing on the record in accordance with the Administrative Procedures Act. The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* at 40 CFR Part 22 set forth EPA's general rules of administrative practice governing the assessment of administrative penalties and require that, before a final order of the U.S. EPA's Environmental Appeals Board issued to a Federal agency becomes effective, the head of the department, agency, or instrumentality of the United States to which the order was issued may request a conference with the Administrator. 40 CFR §22.31(e).

Finally, although federal agencies are subject to the lead disclosure requirements, there may be unique complexities associated with cases against federal agencies. Thus, because of these complexities and because such cases may have major inter-agency implications that rise to a level of national attention, Regions generally should notify and consult with the Federal Facilities Enforcement Office prior to bringing an enforcement action. *See Appendix C* for a link to "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases".

IV. Structure of This Document

This document consists of two policies to guide civil enforcement actions for Disclosure Rule violations. The enforcement response policy in Chapters 3 and 4 addresses violations of the Disclosure Rule and provides guidelines for use in determining the appropriate enforcement response to such violations. The penalty policy in Chapters 5, 6, and 7 provides rational, consistent and equitable penalty calculation methodologies and guidance for use in applying the TSCA Section 16, 15 USC § 2615, statutory penalty factors to particular cases. The penalty policy sets forth the Agency's policy and internal guidelines for determining penalty amounts that: (1) should be sought in administrative actions filed under TSCA[3] and (2) would be acceptable in settlement of administrative and judicial enforcement actions under TSCA. Together these policies are known as the *Disclosure Rule Enforcement Response and Penalty Policy* (*Disclosure Rule ERPP*).

Violations of the Disclosure Rule are subject to civil penalties under Section 16(a) of the Toxic Substances Control Act (TSCA), 15 USC § 2615(a). Section 1018(b)(5) of Title X specifically states:

[3] This Policy does not limit the penalty amount that may be sought; the United States may, in its discretion, continue to request a civil penalty up to the statutory maximum amount, and may litigate for the maximum amount justifiable on the facts of the case.

> *It shall be a prohibited act under Section 409 of the Toxic Substances Control Act for any person to fail or refuse to comply with a provision of this section or with any rule or order issued under this section. For purposes of enforcing this section under the Toxic Substances Control Act, the penalty for each violation applicable under Section 16 of that Act shall be no more than $10,000.*[4]

Therefore, violations of the Disclosure Rule are prohibited acts under Section 409 of TSCA, 15 USC § 2689. Section 16 of TSCA states that any person who violates a provision of Section 409 shall be liable to the United States for a civil penalty.

[4] The maximum penalty amount was adjusted to $11,000 per violation under the *Civil Monetary Penalty Inflation Adjustment Rule*, 40 CFR Part 19 (1998), which increased, by ten percent, the civil penalties which can be assessed for violations occurring on or after July 28, 1997. Subsequent amendments to the *Civil Monetary Penalty Inflation Adjustment Rule* further provide for a 17.23% penalty increase for violations occurring on or after March 15, 2004, but the rule did not adjust the statutory maximum penalty amount which is still $11,000 per violation at this time. 40 CFR Part 19 (2004)

Chapter 2: Summary of Rule and Requirements

The purpose of the Disclosure Rule is to ensure that individuals and families receive the information necessary to protect themselves and their families from lead-based paint and/or lead-based paint hazards. This information will help families and individuals make informed housing decisions to reduce their risk of exposure to lead-based paint and lead-based paint hazards.

The Disclosure Rule requires sellers, lessors and agents to comply with certain requirements when selling or leasing housing built before 1978 (target housing). For purposes of the Disclosure Rule, "seller" is defined as any entity that transfers legal title to target housing, in whole or in part. The Disclosure Rule defines "lessor" as any entity that offers target housing for lease, rent, or sublease. "Purchaser" is defined as an entity that enters into an agreement to purchase an interest in target housing under the Disclosure Rule. "Lessee" is defined as any entity that enters into an agreement to lease, rent, or sublease target housing. Finally, the Disclosure Rule defines "agent" as any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, to sell or lease target housing.

The Disclosure Rule requires that, before a purchaser or lessee is obligated under any contract to purchase or lease target housing, certain requirements must be met. These requirements include the following:

- Sellers and lessors must provide purchasers and lessees with an EPA-approved lead hazard information pamphlet;
- Sellers and lessors must disclose the presence of any known lead-based paint and/or lead-based paint hazards to the purchasers and lessees and to any agent;
- Sellers and lessors must provide purchasers and lessees with any available records or reports pertaining to the presence of lead-based paint and/or lead-based paint hazards in the target housing;
- Sellers must grant purchasers a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards, unless the parties mutually agree, in writing, upon a different period of time or the purchaser waives, in writing, the opportunity to conduct the risk assessment or inspection;
- Sellers and lessors must disclose information pertaining to lead-based paint and/or lead-based paint hazards as an attachment to a contract to sell target housing or as an attachment or within a contract to lease target housing in accordance with the Disclosure Rule requirements;
- Sellers, lessors and agents must retain a copy of each Disclosure Rule statement and certification for at least three years from completion of the transaction; and
- Each agent involved in any transaction to sell or lease target housing must ensure compliance with all requirements of the Disclosure Rule.

The Disclosure Rule does not apply to the following transactions:

- Sales of target housing at foreclosure;
- Leases of target housing that has been found to be lead-based paint free by an inspector certified under the Federal program or under a federally accredited state or tribal certification program;
- Short term leases of 100 days or less, where no lease renewal or extension can occur;
- Lease renewals where the lessor previously met all disclosure requirements and the information pertaining to lead-based paint and/or lead-based paint hazards has not changed;
- The sale or lease of 0-bedroom dwellings; and
- The sale or lease of housing for the elderly or persons with disabilities (unless any child under six (6) years of age resides or is expected to reside in such target housing).

Chapter 3: Responsible Party / Appropriate Respondent

The individuals who must comply with the Disclosure Rule are sellers, lessors and agents who are involved in the selling or leasing of target housing. The Disclosure Rule specifically addresses the responsibilities of agents by requiring them to ensure compliance with the provisions of the law. Agents fulfill this requirement by informing sellers and lessors of their obligations and by making sure that these activities are completed by the seller, lessor, or the agent personally. The Disclosure Rule also identifies the affirmative duty of the sellers and lessors to disclose to their agents any known lead-based paint and/or lead-based paint hazards in target housing.

In determining the appropriate respondent(s) for the enforcement response, consideration should be given to the person(s) / entity(ies) with direct control over disclosure activities.

See Appendix A for examples of common responsible parties.

Chapter 4: Determining the Level of Action

When evidence supports an enforcement action, the Region should determine, using the criteria set forth below, which of the following responses is appropriate: a notice of noncompliance; a civil administrative complaint; a criminal referral; injunctive relief; or some combination of these actions.

I. Notices of Noncompliance

On a case-by-case basis EPA may determine that the issuance of a notice of noncompliance (NON) is the most appropriate response. Facts and circumstances will vary, but this enforcement response may be used when a violator has substantially complied with the requirements of the Disclosure Rule and timely disclosure has been made. For example, if an agent provided a purchaser with the 10-day opportunity to conduct an inspection and a copy of the lead pamphlet but failed to sign the disclosure form, a NON typically is the appropriate enforcement response. In addition, if the proposed penalty is $1,000 or less following the application of downward penalty adjustment factors provided in this policy, EPA may issue a NON in lieu of seeking a penalty.

A NON should require a violator to take corrective action to comply with the Disclosure Rule. The type and nature of the corrective action will depend upon the specific violation(s). The NON also may require that action be taken by a certain date and that proof of its completion be submitted promptly to EPA.

II. Civil Administrative Complaints

A civil administrative complaint generally is the appropriate response to violations of the Disclosure Rule. Violators may be subject to civil penalties pursuant to TSCA Section 16. On September 10, 1980, EPA published the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy,* 45 Fed. Reg. 59771 (1980). This penalty system provides the general framework for civil penalty assessments under TSCA. It establishes standardized definitions and applications of factors that TSCA requires the Administrator to consider in proposing to assess a civil penalty. The TSCA penalty system also states that as regulations are developed, specific penalty guidelines will be developed adopting in detail the application of the general penalty system to the new regulation.

A civil administrative complaint may contain a proposed penalty that has been calculated pursuant to this policy. Alternatively, the complaint may specify the number of violations for which a penalty is sought, a brief explanation of the severity of each violation alleged, and a recitation of the statutory penalty authority applicable for each violation in the complaint. 40 CFR 22.14(a)(4). This "notice pleading" approach would not eliminate the need for EPA to specify a proposed penalty and explain how the proposed penalty was calculated in accordance with Section 16 of TSCA, but would postpone such requirement until after the filing of

prehearing information exchanges, at which time each party shall have exchanged all factual information considered relevant to the assessment of a penalty. 40 CFR 22.19(a)(4).

An administrative action should result in an enforceable agreement and the assessment of a penalty. Before a penalty order becomes final, Section 16(a)(2)(A) of TSCA, 15 USC § 2615(a)(2)(A), requires the Administrator to provide each respondent with notice and an opportunity for a formal hearing in accordance with the Administrative Procedures Act. EPA's general rules of administrative practice governing the assessment of administrative penalties are set forth in 40 CFR Part 22, entitled *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*.

III. Criminal Sanctions

In addition to being subject to the various types of civil sanctions, any person who knowingly or willfully violates any provision of Section 409 of TSCA is subject to misdemeanor criminal sanctions. *See*, Section 16(b) of TSCA, 15 USC § 2615(b). These sanctions include imprisonment for not more than one year, as well as a criminal fine of not more than $25,000 for each day of violation.[5] Disclosure Rule violations which are especially egregious in nature – in terms of the threat of harm, or the level of culpability, or both – should be brought to the attention of EPA's Criminal Investigation Division. This Division will determine whether to exercise its discretion to pursue a criminal investigation and, where appropriate, to refer the matter to the United States Department of Justice (DOJ) for a prosecutorial determination.

IV. Injunctive Relief

The EPA may obtain injunctive relief by requesting the legal support of DOJ. DOJ may make an application for injunctive relief in U.S. district court under TSCA Section 17(a), 15 USC § 2616(a), to direct a violator to comply with the Disclosure Rule. In addition to requesting such relief, DOJ, on EPA's behalf, also may request that the court use its general equity powers to compel a violator of the Disclosure Rule to abate the lead-based paint and/or lead-based paint hazards in the target housing.

V. Multiple Remedies

There may be circumstances where more than one enforcement response is appropriate.

> **Criminal Sanctions:** The law is well settled that simultaneous civil and criminal enforcement proceedings are legally permissible. The Regions may conduct parallel proceedings where appropriate.

[5] As modified by the Alternative Fines Act, 18 USC § 3571, an individual could be fined up to $100,000 for a violation that does not result in death, or an amount calculated according to the loss to a victim or the gain by the defendant, whichever is greater. Organizations may be fined up to $200,000 per count.

Civil Administrative Penalty and Injunctive Relief: There may be instances in which the concurrent filing of a civil administrative complaint and a request for injunctive relief is appropriate.

The use of multiple responses depends on the facts and circumstances of each case.

Chapter 5: Calculating the Proposed Penalty

In determining the amount of any civil penalty for violations of the Disclosure Rule, Section 16 of TSCA requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations alleged 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 (*i.e.*, the "TSCA statutory penalty factors"). In developing a proposed penalty, EPA will take into account the particular facts and circumstances of each case, with specific reference to the TSCA statutory penalty factors. This *ERPP* follows the general framework described in EPA's *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy,* 45 Fed. Reg. 59771 (1980) (TSCA Civil Penalty Guidelines) and includes an analysis of the TSCA statutory penalty factors, as well as guidance on their application to particular Disclosure Rule violations. In this manner, this *ERPP* provides a rational, consistent and equitable penalty calculation methodology for applying the TSCA statutory penalty factors to Disclosure Rule violations in civil enforcement cases. *See Appendix C* for a link to the TSCA Civil Penalty Guidelines.

Gravity refers to the overall seriousness of the violation. To determine the gravity-based penalty, the following factors are considered:

- the "nature" of the violation;
- the "circumstances" of the violation; and
- the "extent" of harm that may result from a given violation.

These factors are incorporated into a penalty matrix that specifies the appropriate gravity-based penalty. *See Appendix B*.

Once the gravity-based penalty has been determined, upward or downward adjustments may be made to that penalty amount by considering other factors, including the following:

- the violator's ability to pay/ability to continue in business;
- the violator's history of prior violations;
- the violator's degree of culpability;
- voluntary disclosure of violations by the violator; and
- such other factors as justice may require.

These adjustments are discussed in more detail in Chapter 7.

1. Nature

The TSCA Civil Penalty Guidelines discuss the "nature" of the violation as the essential character of the violation and incorporate the concept of whether the violation is of a chemical control, control-associated data gathering, or hazard assessment nature. The requirements of

40 CFR Part 745, Subpart F, are most appropriately characterized as "hazard assessment" in nature. The Disclosure Rule requirements are designed to provide potential purchasers and lessees of target housing with information that will permit them to weigh and assess the risks presented by the actual or possible presence of lead-based paint and/or lead-based paint hazards in the target housing they might purchase or lease. This information is vital to purchasers and lessees to make an informed decision about whether to reside in target housing because of the potential risk to all inhabitants and particularly to young children and/or pregnant women residing in that target housing. The "nature" of the violation will have a direct effect on the measure used to determine which "circumstances" and "extent" categories are selected on the gravity-based penalty matrix in *Appendix B*.

II. Circumstances

The "circumstances" reflect the probability of harm resulting from a particular type of violation. For a Disclosure Rule violation, the harm is associated with the failure to disclose information on lead-based paint and/or lead-based paint hazards. Therefore, the primary circumstance to be considered is the purchaser's or lessee's ability to properly assess and weigh the factors associated with human health risk when purchasing or leasing target housing. The greater the deviation from the regulations (such as no disclosure), the greater the likelihood that the purchaser or lessee will be uninformed about the hazards associated with lead-based paint and, consequently, the greater the likelihood of harm due to exposure to lead-based paint and/or lead-based paint hazards.

The following system ranks potential violations using six levels that factor in compliance with the disclosure requirements and the level of potential harm associated with the purchaser's or lessee's lack of knowledge of lead-based paint and/or lead-based paint hazards in the target housing. For purposes of this penalty policy, the specific violations of the Disclosure Rule have been characterized as follows:

Levels 1 and 2:	Violations having a high probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.
Levels 3 and 4:	Violations having a medium probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.
Levels 5 and 6:	Violations having a low probability of impairing the purchaser's or lessee's ability to assess the information required to be disclosed.

III. Extent

The term "extent" is used to consider the degree, range, or scope of the violation's potential for harm. In the context of the Disclosure Rule, the measure of the extent of harm will focus on the overall intent of the rule, which is to prevent childhood lead poisoning. For example, the potential for harm from the failure to disclose known lead-based paint and/or lead-

based paint hazard information to the purchaser or lessee of target housing would be considered "major" if risk factors are high for exposure. TSCA Civil Penalty Guidelines provide the following definitions for the three extent categories:

Major:	Potential for "serious" damage to human health or the environment.
Significant:	Potential for "significant" damage to human health or the environment.
Minor:	Potential for a "lesser" amount of damage to human health or the environment.

Therefore, specific violations of the Disclosure Rule requirements have been characterized as "major," "significant," or "minor" in extent. Under the Disclosure Rule, the extent factor is based on two measurable facts:

- the age of any children who live in the target housing; and
- whether a pregnant woman lives in the target housing.

Age of child(ren) living in target housing: Any individual can be adversely affected by the presence of lead-based paint and/or lead-based paint hazards in target housing. The most serious reactions may include nausea, vomiting, seizures, coma or death as a result of lead poisoning. Children under the age of six are most likely to be adversely affected and to exhibit other long-term effects of exposure to lead, based on habits (particularly hand-to-mouth activity) and vulnerability due to their continuing physical development. As children mature into adults, they are less affected by the presence of lead. The age factor will be determined by the age of the youngest individual residing in the target housing at the time the violation occurred or the youngest individual in the family that is purchasing or leasing the target housing.

If complainant knows or has reason to believe that a child under the age of six is present, then for purposes of proposing a gravity-based penalty, the major extent category may be used. Where the age of the youngest individual is not known, or a respondent is able to demonstrate to EPA's satisfaction that the youngest individual residing in or to be residing in the target housing at the time of the violation was at least six years of age and less than 18 years of age, then EPA may use a significant extent factor. Where a respondent is able to demonstrate to EPA's satisfaction that no individuals younger than eighteen years of age were residing in or to be residing in the target housing at the time of the violation, then EPA may use a minor extent factor.

Pregnant women living in target housing: Pregnant women are also very susceptible to the dangers of lead-based paint and/or lead-based paint hazards. Lead exposure before or during pregnancy can alter fetal development and cause miscarriages. If EPA determines that a pregnant woman resided in or was purchasing/leasing the target housing at the time violation occurred, then a major extent is appropriate.

IV. Economic Benefit of Noncompliance

A seller, lessor or agent who has violated the Disclosure Rule may not profit from his/her violative acts. Based on the Agency's 1984 Policy on Civil Penalties, the Agency should eliminate economic incentives for noncompliance by recapturing any significant economic benefit of noncompliance that accrues to a violator from noncompliance with the law. *See Appendix C for a link to this policy.* If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to consider economic benefit. Economic benefit can result from a violator delaying or avoiding compliance costs, or when a violator achieves an illegal competitive advantage through its noncompliance. The compliance costs per unit to comply with the Disclosure Rule are generally low, and economic benefit of noncompliance is not usually included in proposed penalties. However, on a case-by-case basis EPA may determine that an economic advantage has been gained and a penalty for economic benefit should be sought.[6]

[6] Section 1018 of Title X also allows the purchaser or lessee to bring a civil action for damages and the court may award treble damages, court costs, reasonable attorney fees, and expert witness fees if that party prevails.

Chapter 6: Determining the Number of Violations

Each requirement of the Disclosure Rule is a separate and distinct requirement and a failure to comply with any requirement is a violation of the Disclosure Rule. In order to determine whether a violation of the Disclosure Rule has occurred, the applicable requirements must be reviewed to determine which regulatory provisions have been violated. For example, each lessor who is leasing target housing must comply with each of the Disclosure Rule requirements of 40 CFR §§ 745.107(a), 745.113(b) and § 745.113(c) including:

- Provide the lessee with an EPA-approved lead hazard information/pamphlet;
- Disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards;
- Disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards;
- Provide to the lessee any available records or reports pertaining to lead-based paint and/or lead-based paint hazards in the target housing;
- Include, as an attachment or within each contract to lease target housing, the Lead Warning Statement;
- Include, as an attachment or within each contract to lease target housing, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of lead-based paint and/or lead-based paint hazards;
- Include, as an attachment or within each contract to lease target housing, a list of any records or reports available to the lessor that pertain to lead-based paint and/or lead-based paint hazards or indicate that no such records or reports are available;
- Include, as an attachment or within each contract to lease, a statement by the lessee affirming receipt of the required information;
- Include, as an attachment or within each contract to lease, a statement by any agent(s) involved in the transaction to lease target housing that such agent(s) has informed the lessor of the lessor's obligations and that the agent(s) is aware of his/her duty to ensure compliance;
- Include, as an attachment or within each contract to lease target housing, signatures and dates of the lessor, agent, and lessee certifying to the accuracy of their statements; and
- Retain a copy of the completed disclosure records for no less than three years from the commencement date of the lease.

Each seller must comply with each of the Disclosure Rule requirements of 40 CFR §§ 745.107(a), 745.113(a) and 745.113(c), which are similar to the requirements for lessors except that the seller must include the disclosure information as an attachment and does not have the option to include the disclosure information within the contract to sell target housing. The seller must also comply with 40 CFR § 745.110, which requires the seller to give the purchaser an opportunity to conduct an inspection or a risk assessment.

Each agent is required by 40 CFR § 745.115(a) to inform the seller or lessor of his/her obligations under 40 CFR §§ 745.107, 745.110, and 745.113; and to ensure that the seller or lessor has performed all activities under these sections, or to personally ensure such compliance. Agents, like sellers and lessors, are required by 40 CFR § 745.113(c) to retain records of sales and lease transactions for three years.

For each transaction reviewed, there may be evidence that a seller, lessor and/or agent has violated one or more of the applicable requirements. After identifying which violations are appropriate to pursue for an individual real estate transaction, based on the applicable regulatory requirements, the next step is to determine the number of real estate transactions in which violations occurred. For purposes of this policy, the term "real estate transaction" refers to those business dealings that result in an agreement between either a lessor/agent and a lessee or a seller/agent and purchaser for target housing. Each real estate transaction is a "stand alone" transaction; therefore, the penalty for each violation found in each individual transaction should be assessed separately. The number of lease agreements or sales contracts reviewed determines the number of real estate transactions involved in a particular case.

For example, if a lessor owns eight target housing units in an apartment building and EPA has evidence that the lessor fails to comply with the Disclosure Rule when leasing each of these units, the lessor generally should be held liable for violating the applicable Disclosure Rule requirements in each of the eight transactions. When the civil administrative complaint is filed against the lessor, all eight transactions should be included in the same complaint. In this case, the total gravity-based penalty would be the sum of the penalties for violations of all applicable requirements for each of the eight transactions.

Chapter 7: Adjustment Factors

Section 16(a)(2)(B) of TSCA, 15 USC § 2615(a)(2)(B), describes the factors that EPA must consider in determining the amount of the civil penalty. As discussed in Chapter 5, EPA must consider the nature, circumstances, extent, and gravity of the violation. With respect to the violator, EPA must consider: the ability to pay/ability to continue to do business; any history of prior such violations; the degree of culpability; and other factors as justice may require.[7] Sections IV and V of this chapter include brief discussions of adjustments for supplemental environmental projects and voluntary self-disclosure that are available under other EPA policies.

EPA ordinarily should make all appropriate upward adjustments of the penalty amount prior to issuance of the proposed penalty, while downward adjustments generally should not be made until after the proposed penalty has been issued, at which time the burden of persuasion that downward adjustment is proper should be placed on the respondent. Unless otherwise noted these factors may be considered either during settlement negotiations or litigation.

1. Ability to Pay/Continue in Business

Section 16 of TSCA requires that the violator's ability to pay the proposed civil penalty be considered as a statutory factor in determining the amount of the penalty. Absent proof to the contrary, EPA can establish a respondent's ability to pay with circumstantial evidence relating to a company's size and sales. The TSCA Civil Penalty Guidelines state that the EPA generally will not request penalties that are clearly beyond the financial means of the violator.

To determine the amount of the proposed penalty in relation to a person's ability to pay, the case team should review publicly available information, such as Dun and Bradstreet reports, a company's filings with the Securities and Exchange Commission (when appropriate) or other available financial reports before issuing the complaint. In determining the amount of a penalty for a violator when financial information is not publicly available, relevant facts obtained from the sales contract or lease (such as the sale or lease amount of the dwelling) or the number of dwellings owned or leased by the violator, may offer insight regarding the violator's ability to pay the penalty.

If a violator raises ability to pay as a defense in its answer or in the course of settlement negotiations, EPA generally should request the following types of information:

- The last three to five years of tax returns;
- Balance sheets;
- Income statements;
- Statements of changes in financial position;
- Statement of operations;

[7] Under unusual circumstances there may be other factors not identified herein that must be considered to reach a just resolution.

- Information on business and corporate structure;
- Retained earnings statements;
- Loan applications, financing agreements, security agreements;
- Annual and quarterly reports to shareholders and the SEC, including 10K reports; and
- Statements of assets and liabilities.

In appropriate circumstances EPA may seek a penalty that might prevent a violator from continuing in business. For example, even when there is an inability to pay, it is unlikely that EPA would reduce a penalty when a seller, lessor, or agent has refused to correct a serious violation or when a seller, lessor, or agent has a long history of violations. This long history would demonstrate that a less severe measure (*i.e.*, a penalty reduction) has been ineffective.

II. History of Prior Violations

When a violator has a history of prior violations of the Disclosure Rule, the proposed penalty should be adjusted upward by a maximum of 25% in accordance with the TSCA Civil Penalty Guidelines. The need for such an upward adjustment derives from the violator not having been sufficiently motivated to comply with the Disclosure Rule by the penalty assessed for the previous violation(s).

For the purpose of this policy, EPA interprets "prior violations" to mean any prior violation(s) of the Disclosure Rule. The following guidelines apply in evaluating the history of such violations:

(1) To constitute a prior violation: (a) the prior violation should have resulted in a consent agreement and final order (CAFO), consent decree, default judgment, non-consensual civil judgment or criminal conviction; and (b) the resulting order / judgment / conviction should have been entered or executed within five calendar years prior to the date the subsequent violation occurred. Receipt of payment made to the U.S. Treasury can be used as evidence constituting a prior violation, regardless of whether a respondent admitted to the violation and/or entered into a CAFO. Issuance of a Notice of Noncompliance does not constitute a prior violation for purposes of this policy.

(2) Two or more corporations or business entities owned by, or affiliated with, the same parent corporation or business entity may not necessarily affect each other's history (such as with independently-owned franchises) if they are substantially independent of one another in their management and in the functioning of their Boards of Directors. EPA reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy. If the violator fails to provide the necessary information and the information is not readily available through other sources, then EPA is entitled to rely on the information it does have in its control or possession.

(3) In the case of wholly-owned subsidiaries, the parent corporation's history of violation applies to all of its subsidiaries. The history of violation for a wholly-owned subsidiary will apply to the parent corporation.

III. Degree of Culpability

This factor may be used only to raise a penalty. TSCA is a strict liability statute for civil actions, so culpability is irrelevant to the determination of legal liability. However, this does not render the violator's culpability irrelevant in assessing an appropriate penalty. Knowing or willful violations generally reflect an increased culpability on the part of the violator and may even give rise to criminal liability. The culpability of the violator should be reflected in the amount of the penalty, which may be increased by up to 25% for this factor.

In assessing the degree of culpability, all of the following points should be considered:

- the degree of control the violator had over the events constituting the violation;
- any actual knowledge of the presence of lead-based paint and/or lead-based paint hazards in the target housing being leased or sold;
- the level of sophistication of the violator in dealing with compliance issues; and
- the extent to which the violator knew of the legal requirement that was violated (for example, did the violator receive a NON or was the requirement to disclose information pertaining to lead-based paint and/or lead-based paint hazards contained in an abatement order received by the violator).

IV. Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are environmentally beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the respondent is not otherwise legally required to perform. SEPs are only available in negotiated settlements.

EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform the proposed SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. The SEP Policy, effective May 1, 1998, defines categories of projects that may qualify as SEPs and establishes procedures for calculating the cost of the SEP and the percentage of that cost which may be applied as a mitigating factor in determining an appropriate settlement amount. *See Appendix C* for links on EPA's website to the current version of the SEP Policy and the November 23, 2004 memo entitled "Supplemental Environmental Projects in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases". EPA should ensure that the inclusion of any SEP in settlement of an enforcement action is consistent with the SEP Policy in effect at the time of the settlement. Examples of potential SEPs are listed in *Appendix D*.

V. Voluntary Disclosure of Violations before an Inspection, Investigation, or Tip / Complaint

The civil penalties that are calculated on the basis of the factors in Chapter 5 of this policy may be reduced or eliminated in negotiated settlements if the violator voluntarily discloses the violations to EPA before EPA receives any information about the violation or initiates an inspection or investigation.

A. Audit Policy

A seller, lessor, or agent who conducts an audit and voluntarily self-discloses any violations of the Disclosure Rule under the *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,* 65 Fed. Reg. 19618, April 11, 2000 (Audit Policy) may be eligible for a reduction of up to 100% of the gravity-based penalty if all the criteria established in the Audit Policy are met. *See Appendix C* for a link to the Audit Policy. Reference should be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

B. Small Business Policy

A business with fewer than 100 employees also may be eligible for elimination of the entire gravity-based penalty under the *EPA's Policy on Compliance Incentives for Small Business* (Small Business Policy) (June 10, 1996). Under the Small Business Policy, a business with fewer than 100 employees is eligible for elimination of the penalty if the violations were discovered as a result of the violator's participation in the compliance assistance program or the conduct of a voluntary self-audit and the violator meets all the criteria listed in the Small Business Policy. *See Appendix C* for a link to the Small Business Policy. Reference should be made to that document to determine whether a regulated entity qualifies for this penalty mitigation.

C. Self-Disclosure

If a violator self-discloses a violation of the Disclosure Rule but does not qualify for consideration under either the Audit Policy or the Small Business Policy, the proposed civil penalty amount may still be reduced for such voluntary disclosure. To encourage voluntary disclosure of Disclosure Rule violations, EPA may make a penalty reduction of up to 25%. An additional penalty reduction up to 25% (for a total of up to a 50% reduction) may be given to those violators who report the potential violation to EPA within 30 days of discovery.

The reduction for voluntary disclosure and immediate disclosure may be made prior to issuing the complaint.

VI. Other Unique Factors

This policy allows an adjustment in settlement for other factors that may arise on a case-by-case basis.

A. Potential for Harm Due to Risk of Exposure

EPA may mitigate the proposed penalty based on information regarding the potential risk of exposure to lead-based paint and/or lead-based paint hazards in the target housing where the violation(s) allegedly occurred.

(1). No Known Risk of Exposure

EPA may adjust the proposed penalty downward by up to 95% if the violator provides EPA with appropriate documentation (such as reports of lead inspections conducted in accordance with HUD Guidelines for Assessment of Lead-Based Paint and Lead-Based Paint Hazards in Target Housing) that clearly demonstrates that the target housing is found by a certified inspector to have been lead-based paint free at the time of the alleged violation.[8] *See Appendix C* for a link to the HUD Guidelines.

(2). Reduced Risk of Exposure

In the absence of evidence of lead-based paint hazards, including soil and/or dust lead hazards, EPA may adjust the proposed penalty downward if the violator provides appropriate documentation of a reduced risk of exposure.[9] The maximum penalty reductions discussed below generally will be available only for those properties where a lead paint risk assessment has documented that there are no lead-based paint hazards.

EPA may adjust the proposed penalty downward by up to 50% if the violator provides documentation that clearly demonstrates that the target housing was interior lead-based paint free[10] in accordance with applicable state and/or local requirements at the time the alleged violation occurred. Where state/local requirements allow for further subcategories, such as lead-based paint free apartment units without lead-based paint free certification in common areas, then the amount of penalty reduction will be less than 50%.

EPA may adjust the proposed penalty downward by up to 40% if the violator provides documentation that clearly demonstrates that a significant potential source of lead-based paint hazards in the target housing was removed prior to the alleged violations (*e.g.*, windows including window frames were replaced, thereby eliminating lead-based paint on a friction surface).

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[8] If the lead-based paint free certification occurred before the date of the lease transaction, the transaction would have been exempt from the regulation. If the lead-based paint free certification occurred prior to the date of a sales transaction, the regulatory requirement to disclose still would have applied.

[9] If the lead-based paint free certification occurred before the date of the lease transaction, the transaction would have been exempt from the regulation. If the lead-based paint free certification occurred prior to the date of a sales transaction, the regulatory requirement to disclose still would have applied.

[10] The term interior lead-based paint free refers to the entire interior including common areas.

EPA may adjust the proposed penalty downward by up to 25% if the violator provides documentation that clearly demonstrates that the target housing was free of lead-based paint hazards at the time the alleged violation occurred (*e.g.*, encapsulation was done or no lead-based paint hazards were found in a hazard assessment done in accordance with all applicable federal, state and local requirements). For each year that elapsed between the time at which the evidence demonstrated that the target housing was free of lead-based paint hazards and the occurrence of the alleged violation, the amount of the adjustment generally will decrease by approximately 5%, so that generally there will be no downward penalty adjustment for hazard reduction after five years.

The overall amount of penalty reduction given for reduced risk will be determined on a case-by-case basis and will depend on a number of variables, including, but not limited to: the scope of work; how the work was conducted (e.g., were lead safe work practices used) and financed; the timing, permanence, demonstrated effectiveness, and actual outcome of the risk reduction; and requirements of federal, state, and local laws, including pre-existing enforcement actions. In order to determine whether an activity presents a reduced risk of exposure, EPA may require additional documentation and/or analytical sampling by the violator, such as clearance testing.

B. Litigation Risk

When developing its settlement position, complainant should evaluate every penalty with a view toward the potential for litigation and attempt to ascertain the maximum civil penalty the court or administrative law judge is likely to award if the case proceeds to hearing or trial. The complainant should take into account, inter alia, the inherent strength of the case and the potential strength of the violator's equitable and legal defenses.[11]

Downward adjustments of the proposed penalty for settlement purposes may be warranted depending on the Complainant's assessment of these litigation considerations. The extent of the adjustments will depend on the specific litigation considerations presented in any particular case. EPA should still obtain a penalty sufficient to remove any economic incentive for violating applicable TSCA requirements. The memorandum signed by James Strock on August 9, 1990, "Documenting Penalty Calculations and Justifications of EPA Enforcement Actions," discusses further the requirements for legal and factual "litigation risk" analyses. See *Appendix C* for a link to this memorandum.

C. Attitude

In cases where a settlement is negotiated prior to a hearing, after other factors have been applied as appropriate, EPA may reduce the resulting adjusted proposed civil penalty by an additional amount of up to 30% for attitude, if the circumstances warrant. In addition to creating an incentive for cooperative behavior during the compliance evaluation and

[11] The resource outlay involved in litigating a case should not be a determining factor in adjusting a penalty to avoid litigation, but may be considered in addition to such other factors as may exist.

enforcement process, this adjustment factor further reinforces the concept that respondents face a significant risk of higher penalties in litigation than in settlement. The attitude adjustment has three components: (1) cooperation; (2) immediate steps taken to comply with the Disclosure Rule; and (3) early settlement.

(1). EPA may reduce the adjusted proposed penalty up to 10% based on a respondent's cooperation throughout the entire compliance monitoring, case development, and settlement process.

(2). EPA may also reduce the adjusted proposed penalty up to 10% for a respondent's immediate good faith efforts to comply with the Disclosure Rule and the speed and completeness with which it comes into compliance.

(3). EPA may reduce the adjusted proposed penalty up to 10% if the case is settled before the filing of pre-hearing exchange documents.

Appendices

Appendix A Responsible Party Examples

This appendix gives examples of parties who may meet the regulatory definition of agent[12] and therefore need to comply with the Disclosure Rule. This is not intended to be a complete or exhaustive list.

Listing Real Estate Agency (Listing Agent): Traditionally, the real estate agency enters into a direct contract with the seller or lessor for the right (exclusive or otherwise) to represent the seller. The contract states the terms of compensation in the amount of a set percentage of the sale price in consideration of the time and effort expended by the broker (real estate agency) on behalf of the seller and in further consideration of the advice and counsel provided to the seller. Thus, real estate agencies may be agents under the Disclosure Rule, and as such would be responsible for ensuring compliance with the Disclosure Rule.

Where an agency is the agent, the Disclosure Rule requirement for signature of an agent may be satisfied by a signature from any sales associate and/or broker who is in a contractual relationship with the seller or lessor for the purpose of selling or leasing target housing.

Selling Real Estate Agency (Selling Agent): The residential real estate sales contract traditionally is brokered between a listing real estate agency that represents the seller, and a selling real estate agency that represents the purchaser. Both agencies are generally paid their commissions by the seller. The listing and selling real estate agencies generally have sales associates who share their sales commission with the real estate agency and all may be agents in a sale or lease of target housing.

Buyer's Agent: Any representative compensated solely by the purchaser is not an agent for the purposes of the Disclosure Rule.

Contract Service Provider: If a seller does not use the services of a real estate agency, but instead handles the transaction personally with the help of a contract service provider, and one responsibility of the contract service provider is to ensure that all the proper documents are used, completed and signed, the contract service provider is an agent and is responsible for ensuring compliance with the Disclosure Rule.

Property Management Firm: Where a property management firm enters into a contract with a seller or lessor for the purpose of selling or leasing target housing and where the firm's duties include ensuring that the parties properly execute all sales and leases, the property management firm may be an agent for purposes of the Disclosure Rule.

[12] *Agent* means any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing. This term does not apply to purchasers or any purchaser's representative who receives all compensation from the purchaser.

Resident Manager: Where a resident manager is an independent contractor who has entered into a contract with a seller or lessor for the purpose of selling or leasing target housing and the duties of the resident manager include ensuring that the parties properly execute all sales and leases, then the resident manager is an agent for the purposes of the Disclosure Rule.

Locator Service: An entity or individual that locates target housing for a lessee and neither contracts with nor is in any way compensated by the lessor is not an agent for the purposes of the Disclosure Rule.

Appendix B Penalty Matrices

Circumstance Level	Disclosure Rule Violation
Components of Full Disclosure	
Level 1	Seller, Lessor, and Agent Requirement: Failure to provide purchaser or lessee EPA-approved lead hazard information/pamphlet pursuant to 40 CFR § 745.107(a)(1)
Level 1	Seller, Lessor, and Agent Requirement: Failure to disclose to purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 CFR § 745.107(a)(2)
Level 1	Seller and Lessor Requirement: Failure to disclose to each agent the presence of any known lead-based paint and/or lead-based paint hazards in the target housing and the existence of any available records or reports pertaining to lead-based paint and/or lead-based paint hazards pursuant to 40 CFR § 745.107(a)(3)
Level 1	Seller, Lessor, and Agent Requirement: Failure to provide purchaser or lessee any records or reports available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing pursuant to 40 CFR § 745.107(a)(4)
Warning Statements	
Level 2	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, the Lead Warning Statement pursuant to 40 CFR § 745.113(a)(1)
Level 3	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the seller disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards pursuant to 40 CFR § 745.113(a)(2)
Level 2	Lessor and Agent Requirement: Failure to include, as an attachment or within the contract to lease target housing, the Lead Warning Statement pursuant to 40 CFR § 745.113(b)(1)
Level 3	Lessor and Agent Requirement: Failure to include, as an attachment or within the contract to lease target housing, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards pursuant to 40 CFR § 745.113(b)(2)
Opportunity to Conduct Inspection	
Level 3	Seller and Agent Requirement: Failure to permit the purchaser a 10-day period to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards or to obtain the purchaser's waiver of such opportunity in writing pursuant to 40 CFR § 745.110

Circumstance Level	Disclosure Rule Violation
Certification and Acknowledgment	
Level 5	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a list of any records or reports available to the seller that pertain to the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such records are available pursuant to 40 CFR § 745.113(a)(3)
Level 4	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the purchaser affirming receipt of the information required by 40 CFR §§ 745.113(a)(2) and (a)(3) and the lead hazard pamphlet required under 15 USC § 2696 (sic, misprint should read § 2686) as specified in 40 CFR § 745.113(a)(4)
Level 4	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by the purchaser that he/she has either had an opportunity to conduct risk assessment or inspection or has waived the opportunity to do so pursuant to 40 CFR § 745.113(a)(5)
Level 5	Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, a statement by one or more agents involved in the transaction to sell target housing that the agent(s) has informed the seller of the seller's obligations and that the agent(s) is aware of his/her duty to ensure compliance with the Disclosure Rule pursuant to 40 CFR § 745.113(a)(6)
Level 5	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a list of any records or reports available to the lessor that pertain to the presence of any known lead-based paint and/or lead-based paint hazards in the target housing or to indicate that no such records are available pursuant to 40 CFR § 745.113(b)(3)
Level 4	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a statement by the lessee affirming receipt of the information required by 40 CFR §§ 745.113(b)(2) and (b)(3) and the lead hazard pamphlet required under 15 USC § 2696 (sic, misprint should read § 2686) as specified in 40 CFR § 745.113(b)(4)
Level 5	Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, a statement by one or more agents involved in the transaction to lease target housing that the agent(s) has informed the lessor of the lessor's obligations and that the agent(s) is aware of his/her duty to ensure compliance with the Disclosure Rule pursuant to 40 CFR § 745.113(b)(5)

Circumstance Level	Disclosure Rule Violation
Failure to Retain Records/Signatures and Dates	
Level 6	Seller and Agent Requirement: Failure to include, as an attachment to a contract to purchase target housing, the signatures of the sellers, agents and purchasers certifying to the accuracy of their statements, as well as dates of said signatures, pursuant to 40 CFR § 745.113(a)(7)
Level 6	Lessor and Agent Requirement: Failure to include, as an attachment or within a contract to lease target housing, the signatures of the lessors, agents and lessees certifying to the accuracy of their statements, as well as dates of said signatures, pursuant to 40 CFR § 745.113(b)(6)
Level 6	Seller, Lessor, and Agent Requirement: Failure to retain a copy of the completed disclosure records for no less than three years from the commencement date of the lease or the completion date of the sale pursuant to 40 CFR § 745.113(c)(1)

Extent Category Matrix

Occupant of the target housing is:	A child under 6 years of age, or a pregnant woman	A child 6 years of age or older but less than 18 years of age or age of occupant not provided	18 years of age or older
Extent:	Major	Significant	Minor

Gravity-Based Penalty Matrix[13]

for violations occurring on or after March 15, 2004

The gravity based penalty, a function of the nature, circumstances, and extent of each violation, is guided by the following matrix.

Circumstance	Major Extent	Significant Extent	Minor Extent
HIGH			
Level 1	$11,000	$7,740	$2,580
Level 2	$10,320	$6,450	$1,550
MEDIUM			
Level 3	$7,740	$5,160	$770
Level 4	$5,160	$3,220	$520
LOW			
Level 5	$2,580	$1,680	$260
Level 6	$1,290	$640	$130

Gravity-Based Penalty Matrix[14]

for violations occurring on or before March 14, 2004

The gravity based penalty, a function of the nature, circumstances, and extent of each violation, is guided by the following matrix.

Circumstance	Major Extent	Significant Extent	Minor Extent
HIGH			
Level 1	$11,000	$6,600	$2,200
Level 2	$8,800	$5,500	$1,320
MEDIUM			
Level 3	$6,600	$4,400	$660
Level 4	$4,400	$2,750	$440
LOW			
Level 5	$2,200	$1,430	$220
Level 6	$1,100	$550	$110

[13] This matrix takes into consideration the *Civil Monetary Penalty Inflation Adjustment Rule,* 40 CFR Part 19 (2004).
[14] This matrix takes into consideration the *Civil Monetary Penalty Inflation Adjustment Rule,* 40 CFR Part 19 (1998).

Appendix C Internet References for Policy Documents

EPA maintains a website with copies of applicable policies and other useful information

EPA Home Page:

http://www.epa.gov

Compliance and Enforcement Home Page:

http://www.epa.gov/compliance/

EPA's 1984 Civil Penalty Policy:

http://www.epa.gov/compliance/resources/policies/civil/penalty/epapolicy-civilpenalties021684.pdf

Documenting Penalty Calculations and Justifications of EPA Enforcement Actions, (Aug 1990):

http://www.epa.gov/compliance/resources/policies/civil/rcra/caljus-strock-mem.pdf

TSCA Enforcement Policy and Guidance Documents:

http://cfpub.epa.gov/compliance/resources/policies/civil/tsca/

Supplemental Environmental Projects:

http://cfpub.epa.gov/compliance/resources/policies/civil/seps/

Final Supplemental Environmental Projects Policy (1998)

http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsup-hermn-mem.pdf

SEPs in Administrative Enforcement Matters Involving Section 1018 Lead-Based Paint Cases (Nov 2004)

http://www.epa.gov/compliance/resources/policies/civil/seps/sepssection1018-leadbasedpaint112304.pdf

Treatment of Lead-based Paint Abatement Work as a Supplemental Environmental Project in Administrative Settlements (Jan 2004)

http://www.epa.gov/compliance/resources/policies/civil/seps/leadbasedabatement-sep012204.pdf

Audit Policy:

http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html

Small Business Policy:

http://www.epa.gov/compliance/incentives/smallbusiness/index.html

Redelegation of Authority:

http://www.epa.gov/compliance/resources/policies/civil/rcra/hqregenfcases-mem.pdf

HUD Technical Guidelines for the Evaluation and Control of Lead Based Paint Hazards in Housing:

http://www.hud.gov/offices/lead/guidelines/hudguidelines/index.cfm

Appendix D Examples of Potential Supplemental Environmental Projects

The following list of potential Supplemental Environmental Projects (SEPs) is not exhaustive, but is intended to offer some examples.[15]

- Abatement of lead-based paint and/or lead-based paint hazards in target housing in compliance with requirements of 40 CFR 227(e)

- Renovation (such as window or door replacement) that includes removal of components containing lead-based paint and/or lead-based paint hazards from target housing, followed by clearance testing as defined in 40 CFR 227(e)(8)

- Risk assessment of target housing to identify lead-based paint hazards, followed by correction of any hazards identified

- Acquisition of an XRF for a governmental organization

- Address lead-based paint and/or lead-based paint hazards in a child-occupied facility through abatement, renovation with clearance testing, or risk assessment with correction of lead-based paint hazards

- Blood-lead level screening and/or treatment for children where Medicaid coverage is not available (Blood-lead level screening and/or treatment for children underserved by Medicaid may also be appropriate, with approval from the Special Litigation and Projects Division in OECA)

- Purchase and operate a mobile health clinic, including outfitting the mobile units … for example, blood lead level testing and treatment for children in public housing

- Purchase and donate lead health screening equipment to schools, public health departments, clinics, etc.

- Provide free lab tests for lead in dust, soil and paint chip samples; make testing available to low-income homeowners, small rental property owners, and community-based organizations

[15] Whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. *(See, Supplemental Environmental Projects Policy, May 1, 1998, page 3)*

ATTACHMENT 4

Designation of EPA Region 5 Electronic Filing System in Proceedings Governed by the Consolidated Rules

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

STANDING ORDER

Designation of EPA Region 5 Electronic Filing System in Proceedings Governed by the Consolidated Rules

Effective Date: September 16, 2020

Background: This Order supersedes the Interim Standing Order on the same subject, issued on August 3, 2020. The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) state that the Presiding Officer may by order authorize or require filing by an electronic filing system, subject to any appropriate conditions and limitations. 40 C.F.R. § 22.5(a)(1).

Designation of Electronic Filing System: Pursuant to my authority as the Regional Judicial Officer (RJO) and Presiding Officer of EPA Region 5, I hereby designate EPA's Microsoft Outlook-based email system to serve as EPA Region 5's electronic filing system (EFS) for documents filed with the RHC in connection with administrative enforcement actions under the Consolidated Rules.

Use of the EFS is subject to the following conditions and limitations:

- **Notice of Standing Order to Respondents** – EPA must include a copy of this Order with all complaints it files and serves;

- **Use of EFS is Discretionary** – This Order does not require parties to file documents using the EFS; rather, it authorizes the use of the EFS as an option, in addition to the methods already authorized by the Consolidated Rules;

- **EFS Email Address** – Documents filed using the EFS must be emailed to r5hearingclerk@epa.gov. A document emailed to the RHC or RJO directly does not constitute filing and will not be deemed to be filed as part of the administrative record for the matter;

- **EFS Email Caption** – The caption of the email sent to r5hearingclerk@epa.gov for electronic filing (the EFS email) must contain: the case name; EPA docket no.; and type of document being filed. (e.g., *In the matter of: ABC Company, Inc.*; Docket No. RCRA-05-2020-XXXX; Complaint);

- **Contact Information and Email Address for Service Required in EFS Email** – The email transmitting the document to the EFS must include for the filing party or its authorized representative: name, telephone number, mailing address, and a valid email address identified for electronic service;

- **Consent to Email Service** – Any party filing a document using the EFS will be deemed to have consented in writing to email service of all documents in the proceeding subject to this Order, as required by 40 C.F.R. § 22.5(b)(2);

- **Using the EFS to Serve Documents on the RJO and Parties Consenting to Email Service**. Any party filing a document by the EFS must also copy the RJO at coyle.ann@epa.gov and any party to the proceeding that has consented in writing to email service. The copy to the RJO and any such party on the EFS email will satisfy the requirement at 40 C.F.R. § 22.5(b) to serve to a copy of the document on the Presiding Officer and any such party Any party filing a document by the EFS must serve any party to the proceeding that has not consented to email service according to the Consolidated Rules;

- **Filing Date** – The filing date of a document in the EFS will be the date indicated on the email received by the RHC email account;

- **File Stamping Documents** – The RHC will date stamp all documents received by the EFS;

- **Original** – A party who files using the EFS will be deemed to have satisfied the requirement at 40 C.F.R. § 22.5(a)(l) to file the original and one copy of each document intended to be part of the record;

- **Compliance with Consolidated Rules** – A party filing a document using the EFS must comply with all the Consolidated Rules, including, but not limited to, rules pertaining to certificates of service and the format and substance of the document being filed. To the extent this Order conflicts with the Consolidated Rules, the Consolidated Rules control;

- **Format of Filed Documents** – Documents filed using the EFS must be in Portable Document Format (.PDF). (EPA is not endorsing this product or the company that makes it.);

- **Signature of Documents** – By filing a document using the EFS, a party, or its authorized representative, represents that the signatory has read the document and to the best of his or her knowledge the statements in it are true, and the document is not interposed for delay. Parties filing documents using the EFS may sign the document with a .PDF of a "wet signature" or a "valid electronic signature";

    - **EPA E-Signatures** – E-signatures by EPA personnel must comply with EPA's Electronic Signature Policy (Directive No. CIO 2136.0) and an Electronic Signature Procedure (Directive No. CIO 2136-P-01.0);

    - **Outside Party/Non-Agency E-Signatures** – To be a "valid electronic signature," e-signatures on documents submitted by an outside/non-EPA party (i.e., a respondent) must be an electronic signature on an electronic document that has been created with an electronic signature device that the identified signatory is uniquely entitled to use for signing that document, where the device has not been compromised, and where the signatory is an individual who is authorized to sign the document by virtue of his or her legal status and/or his or her relationship to the entity on whose behalf the signature is executed. A Certificate Based Digital Signature, such as one created using standard digital signature software can constitute a "valid electronic signature" for proceedings governed by the Consolidated Rules, e.g., Adobe Certify or Sign-With Certificate options. These products embed metadata identifying a unique user and the time and date the signature was applied to the document. The metadata in the document should demonstrate that the signature applied was valid and was not altered after the digital signature was applied;

- **PII and CBI –** The party filing a document using the EFS is responsible for ensuring the document does not contain Personal Identification Information (PII) or Confidential Business Information (CBI). Documents filed using the EFS are deemed to be public documents. Any CBI will be deemed to be waived if the information is filed using the EFS. Additionally, filers may not upload other private information the disclosure of which would constitute an unwarranted invasion of any person's privacy (e.g., social security numbers, birthdates, medical records, personal financial information or other private information). For information about how to file CBI or other private materials, refer to 40 C.F.R. § 22.5(d) and the EPA Office of Administrative Law Judge's (OALJ) Privacy Act Statement and Notice of Disclosure of Confidential and Personal Information;

- **Docket Numbers for Administrative Complaints** – The first page of every filed document must contain a caption identifying the respondent and the docket number. *See* 40 C.F.R. § 22.5(c)(2). Therefore, prior to filing a complaint, the Complainant's representative must request a docket number from the RHC by email to r5hearingclerk@epa.gov. The caption must state "Request for Docket Number; [Case Name]; [Statute] Administrative Complaint." The RHC will respond promptly via email providing the requested docket number;

- **Amendments to Filed Documents** – Once a document has been received by the EFS, it is part of the administrative record of the matter. It cannot be retrieved, deleted or altered in any manner by the submitting party. Amendments to filed documents can only be performed according to the Consolidated Rules; and

- **Applicability –** For all proceedings, except those subject to Subpart I of the Consolidated Rules, the applicability of this Order will terminate as to a particular proceeding when: an answer is filed with the RHC pursuant to 40 C.F.R. § 22.15, an initial decision and default order is issued pursuant to 40 C.F.R. § 22.17; or, the matter is concluded by the entering of a final order pursuant to 40 C.F.R. § 22.18. This Order will be in effect for the duration of proceedings subject to Subpart I of the Consolidated Rules, unless revoked or modified by the RJO. This Order does not apply to the submission of consent agreements and final orders (CAFOs) or expedited settlement agreements (ESAs) for consideration by an RJO. This Order also does not apply to documents filed with the OALJ or the EPA Environmental Appeals Board (EAB). Check the OALJ and EAB websites for e-filing procedures and requirements before those entities.

Amendment and Termination: The RJO may amend or revoke, generally or regarding a specific case or group of cases, the conditions and limitations set forth in this Order by order in her sole discretion at any time. This Order will remain in effect until terminated in writing by the RJO of EPA Region 5.

It is so ordered.

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Ann L. Coyle
Regional Judicial Officer
EPA Region 5

ATTACHMENT 5

Authorization of Service by Email of Documents, except Complaints, Filed by Parties in Proceedings Governed by the Consolidated Rules

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

STANDING ORDER

Authorization of Service by Email of Documents, except Complaints, Filed by Parties in Proceedings Governed by the Consolidated Rules

Effective Date: September 16, 2020

Background: The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), 40 C.F.R. Part 22, state that a copy of each document filed in the proceeding must be served on the Presiding Officer and on each party. 40 C.F.R. § 22.5(b). In addition to other means, the Presiding Officer may by order authorize or require service by email, subject to any appropriate conditions and limitations. 40 C.F.R. § 22.5(b)(2).

Order: Pursuant to my authority as the Regional Judicial Officer (RJO) and Presiding Officer of EPA Region 5, I hereby authorize email service of documents, other than complaints, by a filing party in proceedings governed by the Consolidated Rules.

Email service of documents is subject to the following conditions and limitations:

- **Notice of Standing Order to Respondents** – EPA must include a copy of this Order with all complaints it files and serves;

- **Use of Email Service is Discretionary** – This Order authorizes email service; it does not require email service by any party not using the Electronic Filing System (EFS). *See* 40 C.F.R. § 22.5(a)(1), (b), (b)(2); and "Standing Order – Designation of EPA Region 5 Electronic Filing System in Proceedings Governed by the Consolidated Rules," dated September 16, 2020 (Standing Order Designating EFS). For documents filed through non-electronic means, the date stamp applied by the Regional Hearing Clerk (RHC) to the paper copy of the documents will continue to serve as the official record of the filing date;

- **Service on the Presiding Officer** – Where a party files a document with the RHC using the designated electronic filing system (EFS), service on the RJO is deemed complete if the RJO is copied at coyle.ann@epa.gov on the EFS email filing. *See,* Standing Order Designating EFS. Where a party does not file using the EFS, the party must serve a copy of the document on the RJO directly using one of the methods specified in the Consolidated Rules, in addition to filing it with the RHC. *See* 40 C.F.R. § 22.5(b);

- **Service on Each Party of Filed Documents Other Than the Complaint** – Where a party files a document using the EFS, service is deemed complete if the filing party copies on the EFS email any party that has consented in writing to email service (e.g., has previously used the EFS in the proceeding). *See* Standing Order Designating EFS;

- **Consent to Email Service** – A party that files a document using the EFS is deemed to have consented in writing to email service during the proceeding at the email address it identifies in the EFS email. *See* 40 C.F.R. § 22.5(b); and Standing Order Designating EFS. If a party has not used the EFS and consents to service by email, it must file an acknowledgement of its consent with the RHC identifying a valid email address to be used for service. *Id.*;

- **Certificate of Service** – The Certificate of Service must indicate the means used to serve the document (e.g., "by email");

- **Complaints** – This Order does not apply to complaints initiated under the Consolidated Rules. Complaints must be served according to the Consolidated Rules. *See* 40 C.F.R. § 22.5(a), (b), (b)(1); *see also*, 40 C.F.R. § 22.7(c);

- **Rulings, Orders, Decisions, CAFOs, and ESAs** – This Order does not apply to rulings, orders, decisions and other documents, including consent agreement and final orders (CAFOs) and Expedited Settlement Agreements (ESAs), issued by the Regional Administrator or RJO. Service of those documents is governed by 40 C.F.R. § 22.6; and

- **Applicability** – For all proceedings except those subject to Subpart I of the Consolidated Rules, the applicability of this Order terminates as to a particular proceeding when: an answer is filed with the RHC pursuant to 40 C.F.R. § 22.15, an initial decision and default order is issued pursuant to 40 C.F.R. § 22.17; or, the matter is concluded by the entering of a final order pursuant to 40 C.F.R. § 22.18. This Order will be in effect for the duration of proceedings subject to Subpart I of the Consolidated Rules, unless revoked or modified by the RJO. This Order does not apply to documents filed with the Office of Administrative Law Judges (OALJ) or the EPA Environmental Appeals Board (EAB). Check the OALJ and EAB websites for e-filing procedures and requirements before those entities.

Amendment and Termination: The RJO may amend or revoke, generally or regarding a specific case or group of cases, the conditions and limitations set forth in this Order by order in her sole discretion at any time. This Order will remain in effect until terminated in writing by the RJO of EPA Region 5.

It is so ordered.

_____
Ann L. Coyle
Regional Judicial Officer
EPA Region 5