

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS

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BEFORE THE ADMINISTRATOR

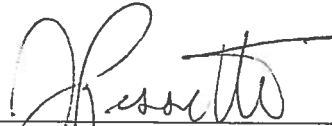
In the matter of)
)
SUPERIOR RESTORATION)
& CONSTRUCTION LLC,)
)
Respondent.)
_____)

Docket. No. TSCA-07-2016-0017

**COMPLAINANT'S RESPONSE TO SECOND ORDER
TO SUPPLEMENT THE RECORD**

In response to the Presiding Officer's Second Order to Supplement the Record, issued June 26, 2018, Complainant hereby submits the Second Declaration of Case Review Officer Candace Bednar as proposed Exhibit P to the Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order. This supplemental declaration provides a detailed description of the civil penalty calculation proposed in Complainant's Motion for Default Order.

RESPECTFULLY SUBMITTED
this 18th day of July, 2018,



Jared Pessetto
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

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SUPERIOR RESTORATION)
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Docket. No. TSCA-07-2016-0017

SECOND DECLARATION OF CASE REVIEW OFFICER CANDACE BEDNAR

I, Candace Bednar, hereby declare that:

1. I am currently employed as a Compliance Officer and credentialed inspector with the Toxics and Pesticides Branch of the Water, Wetlands & Pesticides Division of the U.S. Environmental Protection Agency, Region 7. I have been employed in this capacity since 2011.
2. As a credentialed inspector with the EPA, my duties include conducting inspections and other investigative activities to determine compliance with the agency's regulations at 40 C.F.R. Part 745, Subparts E and F, including the Pre-Renovation Education ("PRE") Rule; Renovation, Repair, and Painting ("RRP") Rule; and the Disclosure Rule. As a compliance officer for the PRE, RRP, and Disclosure Rules, I am also responsible for assigning inspectors to perform inspections and investigate tips and complaints received from the public pertaining to possible violations of 40 C.F.R. Part 745, Subparts E and F; coordinating and training inspectors for field work; and reviewing, evaluating and applying EPA guidance to possible enforcement cases. I have conducted approximately

40 inspections and reviewed approximately 98 investigative case files under the RRP and Disclosure Rules. In addition, I have been involved in the preparation and enforcement of many administrative enforcement actions, including at least 9 administrative complaints, 18 settlements, and 14 notice of noncompliance letters.

3. My involvement in the matter of Superior Restoration & Construction LLC began in September 2015, after the inspection of Respondent's work site at 3415 Charlotte Street in Kansas City, Missouri (the "Property").
4. I have reviewed the investigative case file for this matter, including the inspection report, and am personally familiar with the facts set forth herein.
5. As part of my responsibilities I calculated the proposed penalty for each of the violations alleged in the Complaint, taking into account the statutory civil penalty criteria codified at Section 16(a)(2)(B) of the Toxic Substances Control Act, 15 U.S.C. § 2615, by utilizing the "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"), as revised in April 2013.
6. The LBP Consolidated ERPP provides a rational, consistent, and equitable methodology for applying the TSCA statutory civil penalty criteria to the specific facts and circumstances of this matter, following the framework described in the EPA's "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," published in September 1980.¹

¹ See Exh. M, p. 8; Exh. O, p. 2 n. 2 (attaching "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy," 45 Fed. Reg. 59771 (Sept. 10, 1980)).

7. I calculated the penalty for each alleged violation based on facts and information available to me prior to the EPA's filing of the Complaint on August 16, 2016.

Gravity Based Penalty

8. Pursuant to the LBP Consolidated ERPP, I determined a gravity-based penalty for each alleged violation by utilizing the "Gravity-Based Penalty Matrix for PRE, RRP & LBP Activities Rules," included as Appendix B of the LBP Consolidated ERPP ("GBP Matrix"). The penalty matrix incorporates the following factors: (1) the *nature* of each alleged violation; (2) the *circumstances* of each alleged violation; and (3) the *extent* of harm to human health and the environment posed by each alleged violation. For each alleged violation, I determined the nature, circumstance,² and extent factors, which in turn determined the applicable gravity-based penalty. I then considered whether to adjust the gravity-based penalty upward or downward by considering the violator-specific statutory factors and what, if any, economic benefit accrued to Respondent.
9. The "nature" of violations under TSCA is defined 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."³ The LBP Consolidated ERPP characterizes the requirements of the RRP Rule 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"⁴ The requirements of the PRE Rule, by comparison, are characterized as "hazard assessment"

² Appendix A of the LBP Consolidated ERPP assigns a "Circumstance Level" to each regulatory provision of the Renovation, Repair, and Painting Rule, specifying both the "circumstance" and "nature" factors of the specific violation. See Exh. M, pp. A-1 through A-10.

³ Exh. M, p. 14.

⁴ *Id.* at p. 14.

in nature because they are “designed to provide owners and occupants of target housing . . . with information that will allow them to weigh and assess the risks presented by renovations and to take proper precautions to avoid unnecessary exposure . . . that may be created during a renovation or abatement activity.”⁵ The LBP Consolidated ERPP explains that the “‘nature’ of the violation will have a direct effect on the measure used to determine the appropriate ‘circumstance’ and ‘extent’ categories [that] are selected on the GBP Matrix in Appendix B.”⁶

10. The “circumstance” of the violation assesses “the probability of harm resulting from a particular violation,” categorized by the LBP Consolidated ERPP as either “High,” “Medium,” or “Low.”⁷ For a violation of the PRE Rule, “the primary circumstance to be considered is the occupant’s ability to assess and weigh . . . the factors associated with the risk to their health from the planned renovation, so they can take proper precautions to avoid any lead hazards.”⁸ For a violation of the workplace standards of the RRP Rule, “the primary circumstance to be considered is whether the specific violation has a high, medium, or low probability of impacting human health.”⁹
11. The “extent” of the violation represents the degree, range, or scope of a violation’s potential for harm, which is characterized as either “Major,” “Significant,” or “Minor.”¹⁰ The LBP Consolidated ERPP explains that “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

⁵ *Id.*

⁶ *Id.* at pp. 14-15.

⁷ *Id.* at p. 16.

⁸ *Id.* at p. 15.

⁹ *Id.*

¹⁰ *Id.* at p. 16.

prevent,” based upon three determinable facts: (1) the age of any children who occupy target housing; (2) whether a pregnant woman occupies target housing; and (3) whether a child or children under six years of age had access to the child-occupied facility during renovations/abatement. ¹¹ “Where . . . no individuals younger than eighteen were residing in the target housing at the time of the violation,” the LBP Consolidated ERPP provides that the “Minor” extent category should be applied to the violation. ¹²

12. I have attached to this declaration a penalty calculation worksheet that summarizes the civil penalty determinations described as follows:

Count 1

13. Count 1 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.81(a)(2)(ii) by failing to apply to the EPA for certification pursuant to 40 C.F.R. § 745.89(a)(1) prior to performance of a renovation for compensation on target housing.
14. Because this regulatory requirement is “chemical control” in nature, violation of which poses a medium probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 3a. ¹³
15. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
16. Consistent with the GBP Matrix applicable to violations that occurred after January 12, 2009, included as Appendix B of the LBP Consolidated ERPP, I determined that the

¹¹ *Id.* at pp. 16-17.

¹² *Id.* at p. 17.

¹³ *Id.* at p. A-3 (Section VII).

gravity-based penalty for this Circumstance Level 3a violation with a minor extent is \$4,500.

Count 2

17. Count 2 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.84(a)(1) by failing to provide the owner of the Property with a lead hazard information pamphlet before beginning the renovation.
18. Because this regulatory requirement is “hazard assessment” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 1b.¹⁴
19. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
20. Consistent with the applicable GBP Matrix, I determined that the gravity-based penalty for this Circumstance Level 1b violation with a minor extent is \$2,840.

Count 3

21. Count 3 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.89(d)(2) by failing to ensure that a certified renovator was assigned to the renovation performed by Respondent at the Property.
22. Because this regulatory requirement is “chemical control” in nature, violation of which poses a medium probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 3a.¹⁵

¹⁴ *Id.* at p. A-1 (Section I).

¹⁵ *Id.* at p. A-3 (Section VII).

23. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
24. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 3a violation with a minor extent is \$4,500.

Count 4

25. Count 4 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(1) by failing to post caution tape and warning signs around the yard, front porch, or interior living spaces of the Property where renovation and waste-collection activities were occurring.
26. Because this regulatory requirement is “hazard assessment” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 1b.¹⁶
27. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
28. Consistent with the applicable GBP Matrix, I determined that the gravity-based penalty for this Circumstance Level 1b violation with a minor extent is \$2,840.

Count 5

29. Count 5 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(2)(i)(A) by failing to remove objects from the work area, including drinking glasses, pots and pans, a microwave, window blinds, and other household items; and where Respondent had covered with plastic sheeting certain objects left on kitchen cabinets and countertops, by failing to seal the edges of such plastic sheeting to the floor.

¹⁶ *Id.* at p. A-1 (Section I).

30. Because this regulatory requirement is “chemical control” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 2a.¹⁷
31. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
32. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 2a violation with a minor extent is \$6,000.

Count 6

33. Count 6 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(2)(i)(C) by failing to cover the front porch entry door to the Property with plastic sheeting or other impermeable material.
34. Because this regulatory requirement is “chemical control” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 2a.¹⁸
35. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
36. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 2a violation with a minor extent is \$6,000.

Count 7

37. Count 7 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(2)(i)(D)..

¹⁷ *Id.* at p. A-5 (Section IX).

¹⁸ *Id.*

38. Because this regulatory requirement is “chemical control” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 2a.¹⁹
39. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
40. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 2a violation with a minor extent is \$6,000.

Count 8

41. Count 8 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(4)(i) by failing 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.
42. Because this regulatory requirement is “chemical control” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 2a.²⁰
43. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
44. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 2a violation with a minor extent is \$6,000.

Count 9

45. Count 9 of the Complaint alleges that Respondent violated 40 C.F.R. § 745.85(a)(4)(ii) ensure that such waste collected from the renovation activities was stored under containment at the conclusion of each work day.

¹⁹ *Id.*

²⁰ *Id.*

46. Because this regulatory requirement is “chemical control” in nature, violation of which poses a high probability of impacting human health and the environment, Appendix A of the LBP Consolidated ERPP assigns this alleged violation a Circumstance Level of 2a.²¹
47. Because no individuals younger than 18 resided in the Property at the time of the renovation, I used a minor extent factor for this alleged violation.
48. Consistent with the applicable GBP, I determined that the gravity-based penalty for this Circumstance Level 2a violation with a minor extent is \$6,000.

Penalty Adjustment Factors

49. Consistent with TSCA and the LBP Consolidated ERPP, I then considered whether any upward or downward adjustments to the total gravity based penalty were appropriate. The LBP Consolidated ERPP provides a number of factors that enforcement personnel may consider to modify the gravity-based penalty, including the violator’s ability to pay/ability to continue in business, history of prior such violations, degree of culpability, and such other matters as justice may require, including the violator’s voluntary disclosure of violations, attitude during negotiations, and any other case-specific facts that justify further reduction of the penalty.²²
50. Because Respondent did not engage the EPA in pre-filing negotiations prior to or after the filing of the Complaint, I had inadequate information to determine whether the penalty warranted a downward adjustment to reflect Respondent’s ability to pay or continue in business.
51. I further determined that no upward adjustment to the penalty was appropriate because Respondent had no history of prior such violations or an enhanced degree of culpability.

²¹ *Id.* at p. A-6 (Section IX).

²² *See id.* at pp. 17-24.

Economic Benefit of Noncompliance


52. Consistent with TSCA and the LBP Consolidated ERPP, I then considered whether an economic benefit component should be added to the proposed civil penalty. I determined that the economic benefit resulting to Respondent was not significant, therefore an economic benefit component was not added to the proposed penalty.

Total Proposed Penalty

53. Consistent with TSCA and the LBP Consolidated ERPP, I determined that an appropriate civil penalty for the violations alleged in the Complaint was \$44,680, which is the unadjusted sum of Counts 1 through 9.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 07/18/2018


Candace Bednar
Case Review Officer
Toxics & Pesticides Branch
Water, Wetlands & Pesticides Division
U.S. EPA, Region 7

Penalty Calculation Worksheet
Superior Restoration & Construction LLC

Violation		Extent	Circumstance	Gravity-Based Penalty
1.	40 C.F.R. §§ 745.89(a)(1) & 745.81(a)(2)(ii)—Failure to obtain initial firm certification from EPA.	Minor* *See ERPP, p. A-3, n. 49	Level 3a	4,500
2.	40 C.F.R. § 745.84(a)(1)—Failure to provide property owner with the EPA-approved lead hazard information pamphlet.	Minor	Level 1b	2,840
3.	40 C.F.R. § 745.89(d)(2)—Failure to assign a certified renovator.	Minor	Level 3a	4,500
4.	40 C.F.R. § 745.85(a)(1)—Failure 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 makes sure they remain in place and readable until post-renovation cleaning verification have been completed.	Minor	Level 1b	2,840
5.	40 C.F.R. § 745.85(a)(2)(i)(A)—Failure 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.	Minor	Level 2a	6,000
6.	40 C.F.R. § 745.85(a)(2)(i)(C)—Failure to close windows and doors in the work area and cover doors with plastic sheeting or other impermeable material; doors used as an entrance to the work area must be covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area.	Minor	Level 2a	6,000
7.	40 C.F.R. § 745.85(a)(2)(i)(D)—Failure to cover the floor surface, including installed carpet, with taped-down plastic sheeting or other impermeable material in the work area six feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to contain the dust, whichever is greater.	Minor	Level 2a	6,000
8.	40 C.F.R. § 745.85(a)(4)(i)—Failure to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal and/or failure to cover chute if it is used to remove waste from the work area.	Minor	Level 2a	6,000
9.	40 C.F.R. § 745.85(a)(4)(ii)—Failure, at the conclusion of each work day and at the conclusion of the renovation, to ensure that waste that has been collected from renovation activities is stored under containment, in an enclosure, or behind a barrier that prevents release of dust and debris out of the work area and prevents access to dust and debris.	Minor	Level 2a	6,000
TOTAL				\$44,680

CERTIFICATE OF SERVICE

I hereby certify that the original and one true and correct copy of Complainant's Response to Second Order to Supplement the Record was hand-delivered to the Regional Hearing Clerk of the U.S. Environmental Protection Agency, Region 7, at 11201 Renner Boulevard, Lenexa, Kansas, on July 18, 2018.

A true and correct copy of this filing was sent this day to the following persons in the manner indicated:

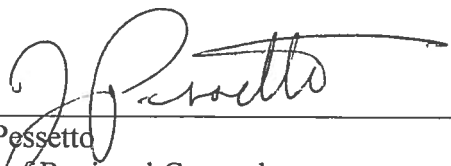
By Hand Delivery

Karina Borromeo
Regional Judicial Officer/Presiding Officer
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

By Certified Mail, Return Receipt Requested

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Jared Pessetto
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