UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN RE:	)	
	)	DOCKET NO. TSCA-03-2015-0258
Boston Design & Construction Co., Inc.	)	
611 Mason Avenue	)	
Drexel Hill, PA 19026	)	Motion for Default Order
	)	
Respondent,	)	
	)	
123 N. Lambert Street	)	Proceeding under Section 16(a) of
Philadelphia, PA 19103	)	the Toxic Substances Control Act,
	)	15 U.S.C. § 2615(a)
Target Housing.	)	

MOTION FOR DEFAULT ORDER

I. PROCEDURAL HISTORY AND LEGAL STANDARD

On September 30, 2015, an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") was issued by the Director of the Land and Chemicals Division, Region III, of the U.S. Environmental Protection Agency ("Complainant"), pursuant to Section 16(a) of the Toxic Substances Control Act, as amended by the Residential Lead-Based Paint Hazard Reduction Act of 1992 (collectively, "TSCA"), 15 U.S.C. § 2615(a), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits* ("Rules of Practice"), 40 C.F.R. Part 22, to Boston Design & Construction Co., Inc. ("Respondent"). The Complaint alleged that Respondent violated certain of the federal regulations set forth at 40 C.F.R. Part 745, Subpart E, and proposed the assessment of a penalty of $12,440 for such violations. A copy of the Complaint is attached as Exhibit A.

A copy of the filed Complaint was first served on Respondent on October 1, 2015, via United Parcel Service ("UPS"), and served a second time on Respondent on June 8, 2016, via UPS as evidenced by the receipts attached to Complainant's Proof of Service (attached as Exhibit B hereto).[1] The June 8, 2016, UPS written delivery verification indicates that the "parcel was delivered on 06/08/16 at 10:05 A.M." and "signed for by RODMAN [sic]." Exhibit B at 5. The delivery verification also bears a signature of which "Boston" appears to be the surname. *Id.* In other words, Rodham Boston signed for the parcel (i.e., the Complaint,) delivered by UPS. This delivery verification was included in Complainant's Proof of Service filed with the Regional Hearing Clerk on June 27, 2016, in accordance with 40 C.F.R. § 22.5(b)(1)(iii). This documents that the Complaint was properly served by UPS, a reliable commercial delivery service that provides written verification of delivery, on Rodham Boston, an officer of a domestic corporation (as alleged in the Complaint at ¶ 17 and as documented by a redacted, unsigned declaration of Mr. Boston (attached as Exhibit D hereto)). Hence the record reflects that Respondent was properly served with a copy of the Complaint as required by Section 22.5(b) of the Rules of Practice, 40 C.F.R. § 22.5(b).

Section 22.15 of the Rules of Practice requires that a written answer to a complaint be filed with the Regional Hearing Clerk within 30 days after service of such complaint. 40 C.F.R. § 22.15. In this case, both the Complaint and the accompanying cover letter (attached as Exhibit C hereto) stated that Respondent's failure to file a written answer within 30 days of receipt of the Complaint would constitute an admission of all facts alleged in the Complaint and a

[1] As the Proof of Service memo indicates, the U.S. Postal Service ("USPS") certified mail receipt attached to the September 30, 2015, filing, was never returned; the USPS certified mail receipt attached to the June 7, 2016, filing, was returned unsigned and undated. However, USPS online tracking indicates delivery was effectuated on October 2, 2015, and June 11, 2016. *See* Exhibit B at 4 and 6, respectively.

waiver of Respondent's right to hearing and result in the possible issuance of a Default Order imposing the penalty. Specifically, the Complaint stated:

> If Respondent fails to file a written Answer within thirty (30) days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged against Respondent in this Complaint and a waiver of Respondent's right to a hearing on such factual allegations. Failure to file a written Answer may result in the filing of a Motion for a Default Order and the possible issuance of a Default Order imposing the penalties proposed herein without further proceedings.
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> Complaint at 11 (emph. omitted).

The cover letter stated:

> You must file an Answer to the Complaint within 30 days of receipt. The Answer must be filed with the Regional Hearing Clerk as directed in the Complaint. The Answer must specifically respond to each of the allegations in the Complaint. Failure to timely respond to the Complaint by specific written Answer will constitute an admission of the allegations in the Complaint. In addition, failure to timely Answer may result in the filing of a Motion for Default Order and the possible issuance of a Default Order imposing the penalty proposed in the Complaint without further proceedings.
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> Exhibit C, ¶ 4.

To date, notwithstanding these admonitions, Respondent has not filed an Answer or any other response with either the Regional Hearing Clerk or Complainant.

Rule 17 of the Rules of Practice states:

> (a) *Default*. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint . . . . 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. . . .
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> (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.
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> (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. . . . 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. . . .
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> 40 C.F.R. § 22.17.

In accordance with Sections 22.16(a) and 22.17(b) of the Rules of Practice, 40 C.F.R. §§ 22.16(a) and 22.17(b), Complainant hereby moves for a Default Order resolving the entire proceeding captioned above by finding Respondent liable for the four violations alleged in the Complaint and assessing a total civil penalty of $12,440 for such violations. The legal and factual grounds for the relief requested are set forth herein.

II. STATUTORY AND REGULATORY BACKGROUND

The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851 *et seq.* (Title X of the Housing and Community Development Act of 1992) ("Title X" or "Residential Lead-Based Paint Hazard Reduction Act of 1992"), was enacted to address concerns about the prevalence of lead poisoning among American children[2] and resulting serious health effects.[3] EPA's December 2007 *Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy* ("*Section 1018 ERP*") at 1. Section 1021 of Title X amended TSCA to add Title IV, "Lead Exposure Reduction," TSCA §§ 401-412, 15 U.S.C. §§ 2681- 2692. Section 1018 of

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[2] In the early 1990s as many as 4 million American homes had lead-based paint and/or lead-based paint hazards that endangered the health of American children. EPA's December 2007 Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy ("2007 Section 1018 ERP") at 1. At that time approximately 890,000 American children had blood-lead levels ("BLLs") that exceeded 10 micrograms/deciliter ("µg/dL") – the level of concern established by the Centers for Disease Control and Prevention. *Id.* The number of American children with elevated BLLs has since declined as reported by EPA in 2007. *Id.* at 2. *See also* Jaime Raymond & Mary Jean Brown, CDC, *Childhood Blood Lead Levels - United States, 2007–2012*, MORBIDITY & MORTALITY WKLY REP., October 23, 2015, 76, at 77-78, https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6254a5.htm?s_cid=mm6254a5_w ("number of children [reported by certain states] with confirmed BLLs ≥ 10 µg/dL declined . . . a trend which is consistent with national data reporting for 2007–2012 . . ."), *citing to* CDC, *Healthy homes and lead poisoning prevention: CDC's National Surveillance Data (1997–2010* [sic]), (2012), http://www.cdc.gov/nceh/lead/data/-StateConfirmedByYear1997-2012.htm.

[3] Lead poisoning can cause numerous deleterious health consequences, including "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." EPA's February 2000 Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy at 1. *See also* Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program, 75 Fed. Reg. 25,038, 25,039-41 (May 6, 2010); Lead; Renovation, Repair, and Painting Program; 73 Fed. Reg. 21,692, 21,693-21,694 (April 22, 2008); and Lead; Renovation, Repair, and Painting Program, 71 Fed. Reg. 1588, 1590 (Jan. 10, 2006).

Title X required, *inter alia*, the promulgation of regulations concerning disclosure of lead information upon transfer of residential property and provided a maximum civil penalty of $10,000 for violations of such regulations. Section 1018 of Title X, 42 U.S.C. § 4852d.

In 1996, the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of Housing and Urban Development promulgated joint regulations implementing Section 1018 of Title X requiring the disclosure of lead-based paint and/or lead-based paint hazards in pre-1978 housing ("target housing") offered for sale or lease. 61 Fed. Reg. 9064 (March 6, 1996) (codified at 40 C.F.R. Part 745, Subpart F, and 24 C.F.R. Part 35, Subpart H)("Disclosure Rule").

In 1996 and 1999, EPA promulgated and amended, respectively, pursuant to Section 402(a) of TSCA, the Lead-Based Paint Activities, Certification, and Training ("LBP Activities") Rule. 61 Fed. Reg. 45,778 (August 29, 1996), 64 Fed. Reg. 42,849 (August 6, 1999)(codified at 40 C.F.R. Part 745, Subpart L). EPA's August 2010 *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* (Appendices A and B revised April 2013) ("ERPP") (attached as Exhibit E hereto), at 2, n.3, and 3. The LBP Activities Rule prescribes "procedures and requirements for the accreditation of training programs and renovations . . . [and] for the certification of individuals and firms engaged in lead-based paint activities, work practice standards for performing such activities, and delegation of programs." *Id.* at 3.

In 1998, pursuant to Section 406(b) of TSCA, EPA promulgated the Pre-Renovation Education ("PRE") Rule. 63 Fed. Reg. 29,907 (June 1, 1998)(codified at 40 C.F.R. Part 745, Subpart E). *Id.* at 2, n.2, and 3. The PRE Rule requires, *inter alia*, that "persons who perform

for compensation a renovation of pre-1978 housing ("target housing") provide a lead hazard information pamphlet to the owner and occupant prior to commencing the renovation." *Id.* at 3.

In 2008, EPA promulgated the Renovation, Repair, and Painting ("RRP") Rule by amending, *inter alia*, the PRE and LBP Activities Rules. 73 Fed. Reg. 21,692 (April 22, 2008) (codified at 40 C.F.R. Part 745, Subparts E, L and Q). *Id.* at 2, n.1, and 3. Specifically, the RRP Rule, 40 C.F.R. Part 745, Subparts E and L, amended pursuant to Section 402(c)(3) of TSCA, prescribes "procedures and requirements for the accreditation of training programs, certification of individuals and firms, [and] work practice standards for renovation, repair and painting activities in target housing and child-occupied facilities . . ." *Id.* at 2.

III. REQUESTED RELIEF

The law and facts regarding Respondent's violations of TSCA and 40 C.F.R. Part 745, Subpart E, are set forth in detail in the Complaint and incorporated herein by reference. As described in the Complaint, Respondent failed to comply with a number of regulatory requirements of the RRP and PRE Rules[4] in connection with its renovation of target housing located at 123 N. Lambert Street, Philadelphia, PA 19103. As a result of its default, Respondent has admitted all the facts alleged in the Complaint supporting the alleged violations and waived its right to contest such factual allegations. 40 C.F.R. § 22.17(a). Accordingly, based on the factual allegations deemed admitted, the Regional Judicial and Presiding Officer can conclude that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, by failing to:

Count I — Obtain its initial firm certification from EPA under 40 C.F.R. § 745.89 prior to performing a renovation at target housing located at 123 N. Lambert Street, Philadelphia, PA 19103 as required by 40 C.F.R. § 745.81(a)(2)(ii);

[4] The Complaint alleges violations of the RRP Rule (Counts I, II, and IV) and PRE Rule (Count III), but cites only the RRP Rule by name. *See* Complaint ¶ 2.

Count II	Ensure that a certified renovator was assigned to the renovation at the target housing located at 123 N. Lambert Street, Philadelphia, PA 19103 and discharged all of the certified responsibilities identified in 40 C.F.R. § 745.90 as required by 40 C.F.R. § 745.89(d)(2);
Count III	Provide the owner of 123 N. Lambert Street, Philadelphia, PA 19103 residential dwelling unit of target housing with the EPA pamphlet, entitled "*Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools,*" at any time prior to the renovation of such target housing as required by 40 C.F.R. § 745.84(a)(1); and
Count IV	Retain all records necessary to demonstrate compliance with Subpart E of 40 C.F.R. Part 745 for a period of three years following completion of the renovation at the target housing located at 123 N. Lambert Street Philadelphia PA 19103 as required by 40 C.F.R. § 745.86(a).

Complainant requests that the Regional Judicial and Presiding Officer issue a Default Order finding Respondent liable for the violations of 40 C.F.R. Part 745, Subpart E, and Section 409 of TSCA, 15 U.S.C. § 2689, as alleged in the Complaint and reiterated above. Further, Complainant requests that the Regional Judicial and Presiding Officer issue a Default Order assessing a civil penalty of $12,440 against Respondent for such violations. As explained below, the requested relief proposed in the Complaint and herein is clearly consistent with the record of this proceeding and the statute authorizing this proceeding, TSCA, warranting the imposition of the relief requested pursuant to Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). An explanation of how Complainant determined the amount of the proposed civil penalty and the legal authority for same follows.

As set forth in the Complaint, pursuant to Section 409 of TSCA, 15 U.S.C. § 2689, it is unlawful for any person to fail or refuse to comply with a provision of Subchapter IV, Sections 401 through 412 of TSCA, 15 U.S.C. §§ 2681 through 2692, or any rule issued thereunder. Any person who violates a provision of Section 409 of TSCA is liable to the United States for a

civil penalty in an amount not to exceed $37,500 for each such violation that occurred on or after January 13, 2009.[5] TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1), as amended.[6]

In determining the amount of any civil penalty to be assessed for any such violation, EPA is required to take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require ("statutory factors"). TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

As set forth in detail in the Declaration of Annie Hoyt ("Hoyt Decl."), attached hereto as Exhibit F, in determining the penalty proposed for Respondent's violations, Ms. Hoyt, an environmental scientist and compliance officer with EPA, took into account the particular facts and circumstances of this case with specific reference to TSCA's "statutory factors," consistent with applicable EPA guidance, the ERPP (Exhibit E). The ERPP provides a rational, consistent and equitable methodology for applying the statutory factors to the specific facts and circumstances of this case, following the general framework described in EPA's 1980 "Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act." ERPP at 8.

The penalty calculation under the ERPP considers the nature, circumstance and extent level of the violation. The "nature" -- the essential character -- of the violation is either "chemical control," "control-associated data gathering," or "hazard assessment." *Id.* at 14. The

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[5] In 2008, EPA promulgated a Civil Monetary Penalty Inflation Adjustment Rule pursuant to the Debt Collection Improvement Act of 1996, increasing the statutory maximum penalty under Section 16 of TSCA to $37,500. 73 Fed. Reg. 75,340-75,346 (Dec. 11, 2008). On June 22, 2016, TSCA's statutory maximum was amended to $37,500 by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. No. 114-182).

[6] Whereas violators of the Disclosure Rule are subject to a lesser maximum inflation-adjusted civil penalty of $16,000 or $16,733 (depending on the date of violation) pursuant to the Residential Lead-Based Paint Hazard Reduction Act of 1992, as amended. 42 U.S.C. § 4852d(b)(5), as amended. *See* 73 Fed. Reg. 75,340-75,346 (Dec. 11, 2008) and 81 Fed. Reg. 43,091-43,096 (July 1, 2016)(to be codified at 40 C.F.R. Part 19).

nature of the violation has a direct effect on the measure used to determine the "circumstance" and "extent" categories of the ERPP. *Id.* at 14-15. The "circumstance" level of a violation is characterized as *high*, *medium* or *low* (on a continuum from a high of "1a" to a low of "6b"), commensurate with such violation's *probability* of harm. *Id.* at 15-16. Appendix A of the ERPP sets forth the circumstance level for particular violations. *Id.* at *A-1-A-10*. The extent level of a violation may be *major*, *significant* or *minor*, representing the degree, range and scope of such violation's *potential* for harm. *Id.* at 16-17.

As explained by Ms. Hoyt, Appendix A[7] of the ERPP (at *A-3*) characterizes violations of 40 C.F.R. § 745.81(a)(2)(ii) (Count I) -- chemical control in nature -- as a Circumstance Level of 3a because failure to obtain an initial firm certification poses a medium probability of harm or impact to human health and the environment. Hoyt Decl. at ¶ 13. Similarly, the ERPP (at *A-3*) characterizes violations of 40 C.F.R. § 745.89(d)(2)) (Count II) -- also chemical control in nature -- as a Circumstance Level of 3a because failure to ensure that a certified renovator is assigned to each renovation performed by the firm also poses a medium probability of harm or impact to human health and the environment. Hoyt Decl. at ¶ 17. Whereas violations of 40 C.F.R. § 745.84(a)(1)(Count III) -- hazard assessment in nature -- are characterized by the ERPP (at *A-1*) as a Circumstance Level of 1b because failure to timely distribute EPA's pamphlet entitled, "*Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools*" poses a high probability of harm or impact to human health and the environment. Hoyt Decl. at ¶ 21. Lastly, violations of 40 C.F.R. § 745.86 (a) (Count IV) -- control-associated data

[7] EPA's 2016 Civil Monetary Penalty Inflation Adjustment Rule does not apply to the violations at issue as each occurred before November 2, 2015. *See* Memorandum Regarding Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation, Cynthia Giles (July 27, 2016), at 1, n.1, and 2. Likewise, EPA's 2013 Civil Monetary Penalty Inflation Adjustment Rule does not apply because each violation occurred before December 7, 2013. *See* Memorandum Regarding Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation, Cynthia Giles (Dec. 6, 2013), at 6, 7.

gathering in nature -- are characterized as a Circumstance Level of 6a by the ERPP (at *A-3*) because failing to retain records poses a low probability of harm or impact to human health and the environment. Hoyt Decl. at ¶ 25.

As explained by Ms. Hoyt, at the time of the renovations, no children under the age of six resided in or were present in the premises as confirmed by the owner of the target housing. Accordingly, the potential for harm of each of the four violations was low, warranting an extent level of *minor* under the ERPP (at *B-2).* Hoyt Decl. at ¶¶ 14, 18, 22, 26. Such level also reflects Respondent's small size consistent with the ERPP. *See* ERPP at 22 and *A-3*, n.49.

In order to determine the unadjusted gravity-based penalty for each violation, Ms. Hoyt utilized the cells that correspond to the applicable row and column (for circumstance level and extent level, respectively,) of the "Gravity-Based Penalty Matrix for PRE, RRP & LBP Activities Rules" for violations that occurred after January 12, 2009 ("GBP Matrix"), included in Appendix B of the ERPP (at *B-2*). Hoyt Decl. at ¶ 6. Because both Count I and Count II violations are deemed Circumstance Level 3a and a Minor Extent Level, the intersection of the applicable row and column on the GBP Matrix (at *B-2*) results in a gravity-based penalty of $4500.00 for each violation. Hoyt Decl. at ¶¶ 15, 19. The intersection of the applicable row and column on the GBP Matrix for a violation characterized as Circumstance Level 1b and Minor Extent Level results in a gravity-based penalty of $2840.00 for Count III.[8] Hoyt Decl. at ¶ 23. Lastly, the intersection of the applicable row and column on the GBP Matrix (at *B-2*) for a violation

[8] As recently explained by the Agency, the ERPP and the 2007 Section 1018 ERP "both penalize violators who fail to provide certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for essentially the same type of deficiency, we have adopted the penalty matrix from the 2007 Section 1018 Disclosure Rule penalty policy in the Pre-Renovation Education Rule component of the 2010 Consolidated Lead-Based Paint penalty [policy] . . ." *See* Memorandum Regarding Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation, Cynthia Giles (July 27, 2016), at 12, n.21.

deemed Circumstance Level 6a and a Minor Extent Level yields a gravity-based penalty of $600.00 for Count IV. Hoyt Decl. at ¶ 27.

As explained by Ms. Hoyt, Complainant did not make any upward or downward adjustments to the penalty as allowed under the ERPP. Hoyt Decl. at ¶ 28. At the time of filing of the Complaint, Complainant was not aware of any past violations of the RRP Rule or PRE Rule or of other circumstances from which to conclude that Respondent's level of culpability was other than negligent. *Id.* Likewise, at the time of filing of the Complaint, Complainant had no basis on which to adjust the penalty to account for the factor of "such other matters as justice may require." Ms. Hoyt also determined that Respondent did not incur any significant economic benefit as a result of its non-compliance. Hoyt Decl. at ¶ 28.

Finally, as Ms. Hoyt attested, Complainant had inadequate information to properly assess either the ability of Respondent to pay the penalty[9] or the effect of any such penalty on Respondent's ability to continue to do business. *Id.* Nevertheless, Complainant did take into account the limited and stale financial information provided voluntarily by Respondent during confidential settlement discussions: its corporate tax returns for 2009, 2010, 2011, 2012, and 2013. As set forth in detail in the Declaration of Craig Yussen ("Yussen Decl."), attached hereto as Exhibit G, in order to determine Respondent's ability to pay, Mr. Yussen, a chemical engineer and compliance officer with EPA, Region III, entered Respondent's limited financial data into one of EPA's publicly available ability to pay ("ABEL") financial models. Yussen Decl. at ¶¶ 1, 2, 4, 5. No attachments, schedules or other supporting documentation were received or reviewed, rendering any ability to pay analysis incomplete. As attested by Mr.

[9] The ERPP notes that "[e]ach 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." ERPP at 22, n.31 (citation omitted).

Yussen, the resulting analysis generated by the model predicted a 59% probability that Respondent can afford to pay a penalty of $12,440 based on projected cash flow and zero pollution control expenses. Yussen Decl. at ¶ 6. Absent additional and more recent information, Complainant has no way to confirm if such result is an accurate characterization of Respondent's *current* financial circumstances. Moreover, notwithstanding the foregoing analysis, Complainant urges the Regional Judicial and Presiding Officer to consider and conclude that, by failing to answer and therefore defaulting, Respondent has waived any objection to the penalty based on any considerations of its ability to pay/continue to do business. *See, In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994) ("[W]here a respondent does not raise its ability to pay as an issue in its answer . . . [Complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived."); *accord, In re Spitzer Great Lakes Ltd., Co.*, 9 E.A.D. 302, 319-21 (EAB 2000). Alternatively, the Regional Judicial and Presiding Officer could presume that Respondent is able to pay/continue to do business given the lack and/or insufficiency of information in the official record. EPA's Environmental Appeals Board has ". . . held that since EPA's ability to obtain financial information about a respondent is limited at the outset of a case, 'a respondent's ability to pay may be presumed until it is put at issue by a respondent.'" *Id.* at 321 (citing *New Waterbury* at 541). *See also, In re Crespo Realty, Inc.,* EPA Docket No. TSCA-03-2012-0069, 2013 EPA Admin. Enforce. LEXIS 18387, at *20-21 (RJO, Initial Decision and Default Order, Aug. 8, 2013) ("The official record is devoid of any information submitted by Respondent raising inability to pay the penalty assessed in this manner [sic]. Since any financial information otherwise contained in the record is insufficient, I find that Respondent is able to pay.").

As described above, having taken into account the statutory factors of TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B), consistent with ERPP methodology, Complainant has determined that the proposed penalty of $12,440 is appropriate for Respondent's violations as alleged in the Complaint. Accordingly, Complainant seeks the assessment of a civil penalty of $12,440 against Respondent for its violations of Section 409 of TSCA and 40 C.F.R. Part 745, Subpart E, as alleged in the Complaint, consisting of $4500 for Count I; $4500 for Count II; $2840 for Count III; and $600 for Count IV.

IV. CONCLUSION

Complainant has demonstrated herein that Respondent has defaulted by failing to file an Answer to the Complaint. By doing so, Respondent is deemed to have admitted the factual allegations in the Complaint supporting the legal conclusions regarding its violations of TSCA and 40 C.F.R. Part 745, Subpart E, as alleged in the Complaint. Complainant has also shown that the relief requested against Respondent, the assessment of a $12,440 civil penalty, is not clearly inconsistent with the record of this proceeding or the statute authorizing this proceeding, TSCA, and therefore, by operation of 40 C.F.R. § 22.17(c), it is incumbent upon the Regional Judicial and Presiding Officer to impose the relief requested in the Complaint and herein. Accordingly, for the foregoing reasons, Complainant respectfully requests that the Regional Judicial and Presiding Officer issue a Default Order against Respondent, finding Respondent liable for the violations alleged in the Complaint and ordering Respondent to pay a civil penalty of $12,440.

Respectfully submitted,

Janet E. Sharke
Senior Assistant Regional Counsel

Date

EXHIBITS

A. Administrative Complaint and Notice of Opportunity for Hearing (Sept. 30, 2015)

B. Proof of Service (June 27, 2016)

C. Cover Letter to Administrative Complaint (Sept. 30, 2015)

D. Redacted unsigned affidavit of Rodham A. Boston, Jr.

E. EPA's August 2010 *Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation and Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* (revised April 2013)

F. Declaration of Annie Hoyt (Oct. 6, 2016)

G. Declaration of Craig Yussen (Dec. 8, 2016)