September 26, 2022

7:58AM

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

Received by
EPA Region 7
Hearing Clerk

IN THE MATTER OF:	)	
	)	
The Askins Development Group, LLC,	)	Docket No. TSCA-07-2019-0280
	)	
	)	
	)	
Respondent.	)	
	)	

INITIAL DECISION AND DEFAULT ORDER

This is a civil administrative proceeding initiated 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 referred to as "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 ("Consolidated Rules"), 40 C.F.R. Part 22.

On September 30, 2019, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 7 ("Complainant" or "EPA"), commenced this proceeding by filing a nine (9) count Complaint and Notice of Opportunity for Hearing ("Complaint") against The Askins Development Group, LLC ("Respondent"). The Complaint alleged in nine (9) counts that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, and the federal regulations of 40 C.F.R. Part 745, Subpart E, *Residential Property Renovation*, in connection with renovation activities it performed in February and March 2016 at a residential property located at 3429 Missouri Avenue, St. Louis, Missouri. The Complaint proposed the assessment of a civil monetary penalty in the amount of Forty-Two Thousand Three Dollars ($42,003) against Respondent for its violations.

In its Motion for Default Order, the Complainant alleges that Respondent is in default for failure to file an answer to the Complaint and that the Respondent has violated Section 409 of TSCA and requests that a penalty of $42,003 be assessed against Respondent for the violations alleged in the Complaint.

Based upon the record in this matter and the Findings of Fact and Conclusions of Law, and Determination of Civil Penalty Amount set forth below, Complainant's Motion for Default Order is **GRANTED**. Pursuant to Section 22.17(a) and (c) of the Consolidated Rules, 40 C.F.R. § 22.17(a) and (c), Respondent is found to be in default and a civil penalty in the amount of $42,003 is assessed.

I. Factual and Procedural History

On November 29, 2018, the EPA, Respondent, and Respondent's attorney participated in a conference call to discuss the violations and a potential resolution of the case. Complainant's Memorandum of Points and Authorities in Support of Complainant's Motion for Default Order ("Complainant's Memorandum in Support of Default Order") at p. 6. On November 30, 2018, the EPA emailed Respondent's attorney memorializing the discussions during the conference call and outlining information Respondent needed to submit to the EPA by the end of December 2018 to demonstrate compliance, allow the EPA to evaluate Respondent's ability to pay and the effect a penalty would have on Respondent's ability to continue to do business, and otherwise progress toward settlement. *Id*. Respondent's attorney replied to the email on November 30, 2018, thanking EPA's attorney. *Id*. Despite the EPA attorney's repeated attempts to engage Respondent's attorney thereafter, i.e., February 4 and 13, 2019, and on March 1 and 7, 2019, Respondent failed to provide any of the information sought or initiate any other progress toward settlement. *Id.* On April 17, 2019, EPA's attorney again emailed Respondent's attorney as to the status of the case and stated that EPA may file a Complaint. *Id*.

On September 30, 2019, EPA initiated this proceeding by filing a Complaint against Respondent The Askins Development Group, LLC pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a) and 40 C.F.R. Part 22. Respondent did not file an answer nor any other response to the Complaint[1], which was required within thirty (30) days of receipt of the Complaint. The Complaint also states if Respondent fails to file a written answer to the Complaint, Respondent may be found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

On February 18, 2021, Complainant filed a Motion for Default Order and supporting documentation.[2] The basis for the Motion for Default is that Respondent failed to timely file an answer to the Complaint. The Motion for Default seeks an Order assessing a civil penalty in the amount of $42,003 against Respondent.

On March 3, 2021, Respondent's attorney filed an entry of appearance for Respondent together with a Motion for Extension of Time to Respond to Complainant's Motion for Default Order. On March 8, 2021, I granted Respondent's Motion for Extension of Time and ordered that Respondent file its answer or otherwise respond on or before March 15, 2021. On March 15, 2021, Respondent filed Respondent [sic] Suggestions in Opposition to Complainant's Motion for Default Order and Memorandum of Law in Support Thereof ("Respondent's Opposition to Default Order"). On March 25, 2021, Complainant filed Complainant's Reply in Support of Its Motion for Default Order ("Complainant's Reply in Support of Default Order").

On April 27, 2021, I held a conference call with the attorneys for the parties in this matter in which a variety of matters were discussed, including Respondent potentially claiming an inability to pay claim. Pursuant to my request during the April 27th conference call, on May 14,

[1] See Affidavit of Amy Gonzales, Regional Hearing Clerk, Exhibit G to Complainant's Memorandum in Support of Default Order.

[2] In addition to filing Complainant's Motion for Default Order, Complainant's Memorandum in Support of Default Order, as well as "Proposed Findings of Fact, Conclusions of Law, Default Order and Initial Decision."

2021, Complainant filed a Status Report detailing Complainant's efforts to explain to Respondent the information needed to process Respondent's ability to pay claim, including Respondent's federal tax filings for the past three years, including all schedules and attachments and a completed ability to pay (ATP) form which Complainant provided to Respondent. Complainant stated that on May 12, 2021, Respondent's counsel provided what appeared to be Respondent's federal tax filings for 2016, 2017, and 2018, together with other financial documentation and Complainant had begun to review the documents to determine if they are complete. The Status Report further stated that Respondent had yet to provide the completed ATP form.

On September 8, 2021, Complainant filed a Second Status Report. In the Second Status Report, Complainant stated that on May 19, 2021, Complainant provided Respondent's tax returns and other financial documentation to the EPA Region 7 finance department, which advised that the documents were insufficient to complete the ATP analysis. Complainant stated that on May 21, 2021, Complainant emailed Respondent's counsel, stating that the Agency had questions about Respondent's tax returns and the financial information provided. On June 21, 2021, Respondent's counsel emailed Complainant the ATP form, which was largely incomplete, or referred back to the financial information previously provided, about which the Agency had questions. On June 24, 2021, Complainant provided Respondent's ATP form to the EPA finance department, which advised that the ATP form was incomplete and that Respondent, despite stating in the ATP form that it had provided asset and liability information (balance sheet), instead had only provided purported income and expenses. Also on June 24, 2021, Complainant emailed Respondent's counsel again stating that the Agency had questions about Respondent's tax returns and the financial information provided. Respondent's counsel emailed Complainant stating he was out of town and asked Complainant to email the tax questions so they could be forwarded to Respondent's tax preparer. On June 25, 2021, Complainant emailed Respondent's counsel a series of preliminary questions related to Respondent's tax returns and the financial information provided. On July 13, 2021, Respondent's counsel emailed Complainant stating that, due to a private matter, he would be unable to address the questions contained in Complainant's June 25 email for at least a "week to two weeks." As of the date of Complainant's Second Status Report, Complainant states Respondent has yet to provide any substantive response to Complainant's preliminary questions about Respondent's tax returns or financial information, nor has Respondent provided a complete ATP form.

On October 19, 2021, I held a conference call with the attorneys for the parties to discuss the status of Respondent's ATP claim. I requested that the parties submit a joint status report by November 12, 2021. On November 12, 2021, Complainant and Respondent filed a Joint Status Report. In the Joint Status Report, the parties stated that following the conference call I held with the parties on October 19, 2021, the parties' attorneys spoke by telephone and Complainant's counsel agreed to send Respondent's counsel an email outlining the information needed by Complainant. On October 29, 2021, Complainant's counsel sent Respondent's counsel an email with an attachment containing a full list of EPA's initial questions, which included some questions that were originally sent by email to Respondent's counsel on June 25, 2021. On November 5, 2021, Respondent's counsel provided responses to four of EPA's initial questions, which the Agency was currently reviewing. Respondent's counsel further advised that he sent EPA's initial questions to Respondent. As of the date of the Joint Status Report, Respondent has

not provided responses to the vast majority of EPA's questions nor a date by which the answers will be provided to Complainant.

In order to move this matter forward, on November 16, 2021, I issued a Scheduling Order establishing deadlines for the parties to exchange information and documents. The Scheduling Order required Respondent to submit all documents, information and responses to Complainant, including complete responses to Complainant's questions set forth in the June 25, 2021, and October 29, 2021, emails, in support of an ATP claim if Respondent intends to make such a claim for purposes of settlement. Additionally, I ordered the parties to confer and jointly file a status report by February 25, 2022.

On February 9, 2022, Respondent's counsel filed a Notice of Withdrawal of Attorney on Behalf of Respondent. On February 26, 2022, Complainant filed Complainant's Third Status Report. Complainant stated that as required by the Scheduling Order, it sent an email to Respondent's counsel identifying the documents, information, and questions/responses necessary for Complainant to conduct the ATP analysis, but as of the date of the Third Status Report, neither Respondent nor Respondent's counsel provided any response to Complainant's email. On February 18, 2022, Complainant sent a letter to Respondent at the address provided by Respondent's (withdrawn) counsel, to Respondent's registered agent as identified on the Missouri Secretary of State's website, and to an alternate address for Respondent which was also identified on the Missouri Secretary of State's website. The letter included a copy of the November 16, 2021, Scheduling Order and requested Respondent's or Respondent's legal representative to contact Complainant to confer and jointly file a status report by the deadline established in the Scheduling Order. As of the date of Complainant's Third Status Report, neither Respondent nor any legal representative of Respondent contacted Complainant and, as a result, Complainant filed the Third Status Report unilaterally. Complainant further stated that without further information regarding Respondent's financial condition, Complainant remains unable to properly evaluate Respondent's ability to pay the penalty sought. To date, Respondent has not complied with my November 16, 2021, Scheduling Order.

On May 16, 2022, I issued a Show Cause Order to Respondent, requiring that on or before May 31, 2022, Respondent show good cause for failing to file a timely answer to the Complaint and comply with the Scheduling Order dated November 16, 2021, and "why a default order should not be entered against it" in accordance with 40 C.F.R. § 22.17(a). To date, Respondent has not responded to the Show Cause Order.

II. Motion for Default Order

A. Respondent's Suggestions in Opposition to Complainant's Motion for Default Order

On March 15, 2021, Respondent filed Respondent's Opposition to Default Order. Respondent sets forth three arguments in opposition to the Motion for Default: 1) Service of process of the Complaint was not properly effectuated; 2) Respondent has a valid excuse or justification for its failure to file an answer; and 3) Respondent has arguable meritorious defenses to allegations in the Complaint.

1. Service of Process of the Complaint was Not Properly Effectuated

Respondent asserts that the Consolidated Rules state that service of process of a complaint shall be made upon either a respondent or a representative authorized to receive service of process on a respondent's behalf. 40 C.F.R. § 22.5(b)(1)(i). Respondent further states that in order for a default judgment to be entered, service of process on Respondent must be valid because defective service vitiates all subsequent proceedings. *See, e.g., In the Matter of Medzam, Ltd*., 4 E.A.D. 87, 92-93 (EAB 1992).

Respondent contends that since Complainant chose to attempt service of process of the Complaint upon Respondent's registered agent by U.S. Postal Service (USPS), the Complainant was required to fully comply with 40 C.F.R. § 22.5(b)(1)(i) that specifically states that such service can only be accomplished "by certified mail with return receipt requested." Respondent argues that when serving a complaint by mail, Complainant had control over how to instruct the USPS the service type by completing Item #3 of the reverse side of the "green card" for the type of mail service requested by the sender, i.e., certified mail, registered mail, insured mail, priority mail express, return receipt for merchandise, collect on delivery, or a combination of one or more of these types of mail service. Respondent submits that Complainant failed to provide any written instructions to the USPS as to how the Complaint was to be delivered to Respondent's Registered Agent. Nowhere on the green card did Complainant instruct the Postal Service in Item #3 of the reverse side of the green card, i.e., no box was checked, that the Complaint was to be delivered to Respondent's Registered Agent "by certified mail with return receipt requested." As a result, Respondent contends that speculation of the method of delivery by the USPS of the Complaint is not satisfactory for compliance with 40 C.F.R. § 22.5(b)(i), nor is it in compliance with the requirements of due process. *See, e.g., Katzson Bros., Inc. v. U.S.EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988). Because service of process of the Complaint upon Respondent's Registered Agent was defective, Respondent argues that such inadequacy vitiates all subsequent proceedings in this matter.

2. Respondent Has Valid Excuse or Justification for Its Failure to File an Answer

Respondent asserts that in the event the Regional Hearing Clerk[3] decides that service of process of the Complaint upon Respondent's Registered Agent was not defective, then pursuant to 40 C.F.R. § 22.15, any answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the Complaint. However, Respondent claims that it can demonstrate a valid excuse or justification for its failure to file a timely written answer to the Complaint. Respondent contends that its delay in answering the Complaint was not intentionally or recklessly designed to impede the judicial process given the challenges the Respondent had within the last 12 months in managing its business affairs with its principal place of business in California and this pending Complaint pertaining to events that occurred in Missouri after being subjected to COVID-19 emergency extant in those particular states. Respondent argues that the test for determining the procedural omission leading to a motion for default order is the "totality of the circumstances" test set forth in *In re: Four Strong Builders, Inc*., 12 E.A.D. 762, 766

[3] Respondent erroneously argues that the Regional Hearing Clerk has the authority to grant the relief requested in its Opposition.

(EAB 2006). There are three parts to the test: 1) whether the party challenging the default order violated a procedural requirement; 2) whether that particular procedural violation constitutes proper grounds for a default order; and 3) whether the party challenging the default order has demonstrated a valid excuse or justification for noncompliance with that procedural requirement. *Four Strong Builders*, 12 E.A.D. at 766-67. *See also In re: Pyramid Chem. Co.*, 11 E.A.D. 657, 661 (EAB 2004) ("When a party commits a procedural violation that can give rise to a default, such as an untimely answer, a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation.") (footnote omitted).

Respondent does not dispute the statements contained in Complainant's Memorandum in Support of Default Order, beginning with the second full paragraph on page 6 and continuing with the concluding paragraph on the top of page 7, which reads as follows:

> *On November 29, 2018, the EPA, Respondent, and Respondent's attorney participated in a conference call to discuss the violations and a potential resolution of the case. On November 30, 2018, the EPA emailed Respondent's attorney memorializing the discussions during the conference call and outlining information Respondent needed to submit to the EPA by the end of December 2018 to demonstrate compliance, allow the EPA to evaluate Respondent's ability to pay and the effect a penalty would have on Respondent's ability to continue to do business, and otherwise progress toward settlement. Respondent's counsel replied to the email on November 30, 2018, thanking EPA's counsel.*
>
> *Despite EPA counsel's repeated attempts to engage Respondent's attorney thereafter, (e.g., on February 4 and 13, 2019, and on March 1 and 7, 2019), Respondent failed to provide any of the information sought or initiate any other progress toward settlement. On April 17, 2019, EPA's counsel again emailed Respondent's counsel as to the status of the case and stating that EPA may file a Complaint. To date, Respondent has not provided any of the information sought in EPA's counsel's November 30, 2018, email, nor any response to EPA counsel's April 17, 2019, email.*

Respondent argues that it utilized good faith intent to amicably resolve the matters Complainant set forth in its Complaint and Notice of Opportunity for Hearing provided under "Docket No. TSCA-07-**2018-0261** In the Matter of: The Askins Development Group, LLC, Respondent," which Complainant served upon Respondent's Registered Agent on or about August 31, 2018.[4] Respondent maintains that during calendar year 2019, it was proceeding with

[4] According to Respondent, Complainant's resolution proposal was that Respondent provide the following: a) For Respondent to become lead certified; b) For Respondent to assign certified renovators with training from an EPA-accredited training provider to each future TSCA regulated residential renovation project; c) For Respondent to complete the EPA Business Organization Ability to Pay Claim (Financial Data Request Form); d) For Respondent to complete the EPA Individual Ability to Pay Claim (Financial Date Request Form); and e) For Respondent to engage with a certified financial/accounting/tax firm to restructure and amended prior income tax returns and financial statements since it was a disregarded entity for tax return purposes in order to determine if it should file with the taxing authorities and provide to the Complainant either amended IRS Forms 1040, or in the alternative, amended

limited time and resources to comply with Complainant's resolution proposal to complete and provide the requested matters and documents when it became challenged in managing its business affairs with its principal place of business in California and this pending Complaint pertaining to events that occurred in Missouri being subjected to COVID-19 emergency extant in those two states.

Additionally, Respondent contends that it justifiably and mistakenly believed that it did not have to engage legal counsel regarding this pending Complaint because it was working under a resolution proposal it believed was the relevant Complaint provided under Docket No. TSCA-07-**2018-0261**. Only after Respondent was served with Complainant's Motion for Default Order under Docket No. TSCA-07-**2019-0280** did Respondent realize it was working under a resolution proposal for the wrong complaint.

Respondent cites the Supreme Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership*, 507 U.S. 380, 395 (1992), which enumerated four factors to use as guidance as to what constitutes "valid excuse or justification" [formally stated in the opinion as "excusable neglect]: 1) Whether the delay in filing was within the reasonable control of the movant; 2) the length of the delay and the delay's potential impact on judicial proceedings; 3) the danger of prejudice to the non-moving party; and 4) whether the movant acted in good faith. Applying the four factors to this matter, Respondent states that COVID-19 was not within the reasonable control of the Respondent which extended the delay for more than a year; the length of the delay should have no potential impact, adverse of otherwise, upon this matter; Complainant would be hard pressed to credibly argue that the delay caused it prejudice; and Respondent was acting in good faith when it was proceeding with its limited time and resources to comply with Complainant's resolution proposal to provide the requested matters and documents when it became subjected to COVID-19 emergency extant in California and Missouri. As a result of demonstrating a valid excuse or justification for its failure to timely file a written answer to the Complaint, Respondent requests that the Regional Hearing Clerk[5] deny Complainant's Motion for Default Order.

3. Respondent Has Arguably Meritorious Defenses to Allegations in the Complaint

Lastly, Respondent argues that it has meritorious defenses to allegations in the Complaint, which are likely to have a material effect on the substantive result of this matter. Respondent's meritorious defenses are as follows:

1) With respect to Count 1 of the Complaint, Complainant never inquired with Respondent as to whether one of its subcontractor laborers at 3429 Missouri Avenue had applied for or obtained certification from the EPA prior to performance of the renovation performance of the renovation of this property;

IRS Forms 1120, 1120S, 8832, or 1065 for the past 3 years of tax returns, and up to and including calendar year 2019.

[5] See fn. 3 above.

2) With respect to Count 2 of the Complaint, Complainant is "solely relying on hearsay unwritten statements from an unqualified purported neighbor providing non-authenticated extrinsic "evidence,"";
3) With respect to Counts 3 – 8 of the Complaint, Complainant is "solely relying" on hearsay photographs[6] and hearsay videos[7] without documenting what time the photographs/videos were taken and without providing authenticity of the photographs/videos. Additionally, Complainant is relying on "hearsay samples of dust"[8] from a neighboring property suggesting to depict uncontained "waste" from undefined renovation activities without providing authenticity that such samples of dust generated from Respondent's renovation of the subject property.

For the foregoing reasons, Respondent requests that the Regional Judicial/Presiding Officer: 1) Deny Complainant's Motion for Default Order; 2) Grant leave for Respondent to provide a formal written answer to the Complaint within 30 days after Complainant's Motion for Default Order is respectfully denied; and 3) Order that this case be handled through the alternative dispute resolution process.

B. <u>Complainant's Reply in Support of its Motion for Default Order</u>

1. <u>The Complaint Was Properly Served on Respondent's Registered Agent by Certified Mail with Return Receipt Requested Pursuant to 40 C.F.R. § 22.5(b)(1)(i)</u>

According to Complainant, the Respondent does not dispute that its designated registered agent received the Complaint on October 4, 2019, acknowledged delivery by signing and dating the USPS Return Receipt form, and that the Return Receipt form was then provided in hard copy and electronically to Complainant by USPS. Complainant contends that Respondent's argument is based on an incorrect assumption that a check box on the green card dictates the method of USPS delivery. Whether the "certified mail" box was checked on the green card has no bearing of which method of delivery was used and is unnecessary to determine whether service was effectuated.

40 C.F.R. § 22.5(b)(1)(i) requires that service of a complaint "shall be made personally, by certified mail with return receipt requested . . ." "Certified Mail" means that the USPS "provides the sender with a mailing receipt and electronic verification that an article was delivered or that a delivery attempt was made."[9]. To the extent that the sender seeks proof of such receipt, as Complainant did in this case, it can purchase return receipt service that requires signature by the recipient upon delivery.[10] ("Signature proof can be requested at the time of mailing by purchasing Return Receipt Service. Customers have the option of receiving the return receipt by mail or electronically.").

[6] Counts 3, 4, 7, and 8.
[7] Counts 4, 5, and 7.
[8] Counts 6 and 8.
[9] Exh. A to Complainant's Reply in Support of Default Order.
[10] *Id.*

In Complainant's Reply in Support of Default Order, Complainant included the sworn declaration of Milady Peters, a paralegal in the Office of Regional Counsel, Region 7.[11] Ms. Peters mailed the Complaint at issue and signed the Certificate of Service for the Complaint. Complainant explained each step that Ms. Peters took in mailing the Complaint with considerable and thorough detail and also provided image exemplars of the steps. The following process summarizes the steps that were taken in the preparation and mailing of the Complaint in this matter[12]:

1. Obtained a USPS Form 3800 ("Certified Mail Receipt") to begin the process of preparing the envelope.
2. The Certified Mail Receipt consists of two parts, separated by a perforation. The right portion is the Certified Mail Receipt itself. The left portion of the Certified Mail Receipt is a Certified Mail sticker.
3. The Certified Mail Receipt bore the article number 7014 1200 0000 6118 7303. The Certified Mail sticker bore the same article number as the Certified Mail Receipt in two locations. The first location is fixed to the Certified Mail sticker. The second location is a sticker in and of itself which bears the same article number ("article number sticker"), which can be removed to be affixed to the PS Form 3811 ("return receipt/green card") as described below. The right portion of the Certified Mail Receipt is the actual receipt that is retained by the sender.
4. Typed in the correct address for Respondent's registered agent on the Certified Mail Receipt.
5. Removed and affixed the Certified Mail sticker to the front of the envelope which was also correctly addressed to Respondent's registered agent.
6. After applying the Certified Mail sticker to the front of the envelope, retained the Certified Mail Receipt.[13]
7. Obtained a PS Form 3811 return receipt/green card and typed in the correct address for Respondent's registered agent.
8. Transferred the article number sticker from the Certified Mail sticker and affixed it to the return receipt/green card in the proper location.
9. Typed the correct address for the EPA attorney assigned to the case on the reverse side of the return receipt/green card.
10. Affixed the return receipt/green card to the back of the envelope.
11. Placed the Complaint and all attachments, i.e., copy of 40 C.F.R. Part 22; Consolidated Enforcement Response Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; Lead Based Paint Activities Rule; and transmittal letter, in the envelope and sealed it.
12. Delivered the envelope to the EPA Region 7 mailroom.
13. The transmittal letter, the front of the envelope containing the Complaint, the return receipt/green card, and the Certified Mail Receipt all bore the same article number 7014 1200 0000 6118 7303.

[11] Declaration of Milady Peters, Exh. B to Complainant's Reply in Support of Default Order .
[12] *Id*.
[13] Exh. C to Complainant's Reply in Support of Default Order.

Complainant contends that return receipt was requested and obtained is evidenced by the fact that the green card was signed by Respondent's registered agent on October 4, 2019, and returned by the USPS to Complainant thereafter.[14] Complainant further maintains that, in addition to the return receipt provided by USPS to Complainant, the following all attest to the invalidity of Respondent's argument:

- Certificate of Service: The Certificate of Service attached to the Complaint represents that a true and correct copy of the Complaint and attachments were sent to Respondent's registered agent "by certified mail, return receipt requested, on September 19, 2019."[15]
- Transmittal Letter: The letter transmitting the Complaint also represents that it was mailed by certified mail, return receipt requested and identifies the same unique article tracking number: 7014 1200 0000 6118 7303.[16]
- Proof of Service: The Proof of Service of Complaint and Notice of Opportunity for Hearing filed by EPA counsel also affirms that on September 30, 2019, the Complaint was filed and sent "by U.S. Postal Service certified mail, with return receipt requested, to Respondent's registered agent." The return receipt/green card was attached to the Proof of Service.
- Milady Peters' declaration[17]

In addition to the return receipt, Complainant states that the USPS website confirms the Complaint was delivered by USPS to Respondent's registered agent by certified mail. By entering in the article tracking number for the Complaint into www.ups.com, the "Product Information" tab verifies that the postal product used to send the Complaint was "Certified Mail" and that it was delivered at 9:54 am on October 4, 2019, to Respondent's registered agent.[18]

Complainant cites to the case of *In the Matter of Tower Exterminating, Corp., AKA Tower & Son Exterminating Corp. and Wilson J. Torres Rivera*, 2017 WL 11467997 (E.P.A.), Docket No. FIFRA-02-2016-5306 (August 10, 2017), where the Regional Judicial Officer for EPA Region 2 was faced with the issue of whether to enter a default order where the green card was signed by the recipient, but undated. In finding that service was valid and entering default, the Regional Judicial Officer analyzed 40 C.F.R. § 22.5(b) and ruled that the green card constituted properly executed receipt and the fact that there was no date on the green card was "of no significance." *Id.* at *37. The Regional Judicial Officer reasoned that "[n]othing in the Rules specifies that, for service to be effective, the return receipt must be dated." *Id.*, citing *In the Matter of A.B.E.F. Development Corp. and Herminio Cotto Construction, Inc.*, Docket No. CWA-02-2010-3465 at 9 (RJO Feb. 15, 2012). The Regional Judicial Officer further noted that other information demonstrated that Respondent's deadline to answer had already passed, including that the USPS Product and Tracking Information indicated that the Complaint was delivered to Respondent on a date certain.

[14] Exh. D to Complainant's Reply in Support of Default Order.
[15] Exh. E to Complainant's Reply in Support of Default Order.
[16] Exh. D to Complainant's Memorandum in Support of Default Order.
[17] Exh. B to Complainant's Reply in Support of Default Order.
[18] Exh. F to Complainant's Reply in Support of Default Order.

Complainant contends that, in this matter, the "unchecked box" on the green card is far less consequential than a missing date on the green card. Further, the Consolidated Rules do not require the "certified mail" box to be checked on the green card for service to be effective. Regardless, according to Complainant, in this case, like in *Tower Exterminating*, there is ample evidence that the Complaint was delivered via certified mail with return receipt requested, that service was therefore proper, and that the deadline for Respondent to answer has long passed.

Complainant also states that nowhere in Respondent's Opposition to Default Order does Respondent argue that it did not actually receive notice of the Complaint. Complainant argues that Respondent tacitly admits it received the Complaint when it stated in its Opposition, "Respondent justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint."[19]

2. Respondent Has Not Provided Valid Excuse or Justification For Its Failure to File an Answer

Complainant asserts that a timeline of the parties' interactions (or lack thereof) regarding this matter over the past two years undercuts Respondent's claims.

- August 31, 2018 – EPA counsel sent to Respondent's registered agent a letter outlining the alleged violations and inviting Respondent to engage in settlement negotiations. Attached to the letter was an unsigned draft copy of a Complaint bearing the docket number TSCA-07-2018-0261.[20]
- October 5, 2018 – Respondent's counsel's office sent a letter to EPA counsel advising that Respondent's counsel represented Respondent, had received the August 31, 2018, prefiling letter, but was out of town and would address the issues when he returned.[21] The letter concluded by stating "[p]lease refrain from filing the complaint until we have an opportunity to respond."[22]
- November 29, 2018 – The parties participated in a conference call to discuss the violations and a potential resolution of the case.[23]
- November 30, 2018 – EPA counsel emailed Respondent's counsel memorializing the discussions during the conference call and outlining the information Respondent needed to submit to the EPA by the end of December 2018 to demonstrate compliance, allow the EPA to evaluate Respondent's ability to pay

[19] Respondent's Opposition to Default Order at p. 9.
[20] According to Complainant, the unsigned draft Complaint bearing the docket number TSCA-07-2018-0261 was never filed, nor purported to be filed. It was subsequently revised to adjust the allegations and the penalty downward based on additional information reviewed; the revised complaint was properly filed and served as TSCA-07-2019-0280.
[21] Exh. G to Complainant's Reply in Support of Default Order.
[22] Complainant states that it is unclear from Respondent's Opposition to Default Order whether Respondent asserts that the unsigned draft complaint bearing the docket number TSCA-07-2018-0261 was filed on August 31, 2018. Regardless, according to Complainant, the statement contained in the October 5, 2018, letter (asking Complainant to refrain from filing that Complaint) affirms that Respondent's Counsel knew the Complaint was not filed. Exh. G to Complainant's Reply in Support of Default Order.
[23] Respondent's Opposition to Default Order at p. 8.

and the effect a penalty would have on Respondent's ability to continue to do business, and otherwise progress toward settlement. [24]

- February and March 2018 – EPA counsel contacted Respondent's counsel on at least four separate occasions in an attempt to obtain financial documents and otherwise to progress toward settlement.[25]
- April 17, 2019 – EPA counsel emailed Respondent's attorney regarding the status of the case and advising that EPA may file a complaint.[26]
- September 30, 2019 – Complaint filed after no contact from Respondent or its counsel nor a response to the April 17, 2019, email.

Complainant contends that Respondent admits that it has not provided any of the information sought initially in EPA counsel's November 30, 2018, email, nor provided a response to EPA counsel's April 17, 2019, email and that Respondent further admits that it never made any contact with EPA between April 17, 2019, and February 18, 2021, the date Complainant filed its Motion for Default.[27]

Complainant maintains that between November 29, 2018 (the date of the first conference call) and September 30, 2019 (the date the Complaint was filed), Respondent had 305 days to come into compliance by becoming lead certified pursuant to 40 C.F.R. § 745.81(a)(2)(ii), to provide the financial information Complainant needed to evaluate Respondent's ability to pay, or otherwise attempt to resolve the case. According to Complainant, the information sought by the Agency was not onerous and a firm can apply for firm certification in minutes by going on-line and paying a fee.[28] Regulated entities are routinely able to provide the financial information sought within days or weeks of such a request.[29] In addition, Complainant states that it contacted Respondent's counsel on five occasions in February, March, and April 2019. Rather than provide the information sought or explain to Complainant why it was unable to provide the information, Respondent chose not to respond.

As to Respondent's claims that limited time and resources hampered its efforts, Complainant asserts that Respondent has not provided basic details, much less any evidence or proof, about why or how its time and resources were allegedly limited and neglects to offer any reasonable explanation for its failure to provide simple information for almost a year between November 29, 2018, and the filing of the Complaint. In short, other than participating in a conference call on November 29, 2018, Respondent appears to have literally done nothing whatsoever to advance this case to the present and is still not firm certified and has not provided any of the financial information sought.[30]

Complainant argues that Respondent's claim that it "justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint because it was

[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Exh. H to Complainant's Reply in Support of Default Order.
[29] *Id.*
[30] *Id.*

working under a resolution proposal it believed was the relevant Complaint provided under Docket No. TSCA-**07-2018-026**1 In the Matter of The Askins Development Group, LLC, Respondent" is not a valid justification for its failure to file an answer to the Complaint. Complainant states that by arguing it made a mistake in believing it did not need to engage its legal counsel regarding the pending Complaint, Respondent necessarily admits it received the pending Complaint. Respondent's apparent belief it did not need to engage its counsel was unreasonable for multiple reasons and is not grounds to evade default. First, Complainant argues, the transmittal letter clearly stated that the Complaint was filed September 20, 2019.[31] Second, as discussed in Complainant's Motion for Default, there are several paragraphs in the Complaint conspicuously describing: (1) how Respondent could resolve the proceeding by paying the proposed penalty (Complaint at ¶¶ 94-95); (2) that if Respondent did not pay the proposed penalty, it must file a written answer within thirty days (Complaint at ¶¶ 96-98); and (3) the consequences of default (Complaint at ¶ 99). Complainant maintains that given these explicit instructions, Respondent's apparent belief that it did not need to engage counsel was unreasonable.

Likewise, Complainant argues that Respondent's apparent belief that it was "working under a resolution proposal" under the wrong Complaint is unjustifiable and inexplicable. First, the unsigned draft complaint in October 2018 was never filed, nor purported to be filed; Respondent's counsel confirmed his knowledge that the Complaint was not filed in the letter to EPA counsel dated October 5, 2018, asking the Agency to "refrain from filing the complaint until we have an opportunity to respond."[32]

Second, other than just vaguely repeating in its Opposition that it was attempting to comply with, or working under, "a resolution proposal" (Respondent's Opposition to Default Order at pp. 8-10), Respondent does not attempt to explain, much less provide any proof of, what it actually did to advance the negotiations. Other than participating in the November 29, 2018, conference call, Respondent appears to have done nothing. Doing nothing to advance the case, including admittedly not responding to EPA's repeated contacts and admittedly not providing even basic information, cannot be reconciled with Respondent's claim to have been "working under a resolution proposal."

According to Complainant, Respondent and its counsel could not have reasonably thought negotiations would continue indefinitely without any progress being made on their end. This is especially true given the repeated unanswered contacts by EPA counsel to Respondent's counsel in February and March 2019, and certainly after Respondent's counsel was informed in April 2019 that the Agency was considering filing a Complaint. The filing of the Complaint on September 30, 2019, and the service of the Complaint on October 4, 2019, certainly should have disabused Respondent of any purported notion that settlement discussions were still ongoing. Complainant states this is particularly true as until the filing of Respondent's Opposition to Default Order in March 2021, neither Respondent nor its counsel had made any effort to contact the Agency since April 2019.

[31] Exh. H to Complainant's Motion for Default.
[32] Exh. G to Complainant's Reply in Support of Default Order.

As for Respondent's claim that the COVID-19 pandemic constitutes a valid excuse or justification for its failure to file an answer, Complainant states that while it is certainly sympathetic to any hardship experienced by Respondent as a result of the pandemic, Respondent's claim is invalid by virtue of the fact that the prefiling negotiations, the filing of the Complaint, and the due date for the answer, all occurred long before the beginning of the pandemic.

The Complaint was served on Respondent's registered agent on October 4, 2019. Complainant contends that Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States regarding COVID-19 on January 31, 2020. California Governor Gavin Newsome declared a state of emergency in California regarding COVID-19 on March 4, 2020. Missouri Governor Mike Parsons declared a state of emergency in Missouri regarding COVID-19 on March 13, 2020. All of these declarations occurred months after Respondent's registered agent received the Complaint and, as such, Complainant argues that the pandemic is not a valid excuse or justification for Respondent's failure to respond to EPA's repeated contacts nor file an answer.

Complainant also argues that Respondent's claims that its time and resources were so limited, or that it was "working under a resolution proposal" such that it could not respond to any of Complainant's requests from November 30, 2018 to the present, nor contact the Agency after April 2019, nor file an answer are suspect on their own, but even more so considering the information on Respondent's website https://askinsdevelopment.com. According to the "About Us" section of its website, Respondent "is a community active Real Estate Development firm that specializes in repurposing and developing mainly historical renovations of dilapidated home[s] generally with the urban communities. Unlike most 'rehabbers' we take enormous pride and care in our work."[33] In the "Recently Sold" section of its website, three properties are listed that appear to have been renovated by Respondent between 2018 through 2020, the time period Respondent claims its "limited time and resources" prevented it from responding to this action: 4220 Botanical Avenue, St. Louis, Missouri 63110[34]; 3952 Botanical Avenue, St. Louis, Missouri 63110[35]; and 2356 Virginia Avenue, St. Louis, Missouri 63110[36].

According to the Complainant, the City of St. Louis has a website[37] that allows the public to search property information, including dates and types of permits (including building, electrical, mechanical, plumbing) by property address. For the 4220 Botanical Avenue property, the City of St. Louis website shows permits issued as early as August 31, 2018, and a completion date as late as June 12, 2019.[38] The description for two of the permits is listed as "Orlando Askins" and another is listed as "Orlando."[39]

[33] Exh. I to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[34] Exh. J to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[35] Exh. K to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[36] Exh. L to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[37] https://www.stlouis-mo-gov/data/address-search/index.cfm (visited March 24, 2021)
[38] Exh. M to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[39] *Id*.

For the 3952 Botanical Avenue property, the City of St. Louis website shows permits issued as early as February 11, 2019, and a completion date as late as September 10, 2020.[40] The description for two of the permits is listed as "Orlando."[41] The City of St. Louis website lists this property as having been built in 1912, and therefore is likely subject to regulation under the TSCA Lead Renovation, Repair and Painting (RRP) Rule.[42] For this property, the owner is listed as Shaw Holding Group, LLC.[43] According to the Missouri Secretary of State, Orlando Askins is the manager of the Shaw Holding Group, LLC.[44]

For the 2356 Virginia Avenue property, the City of St. Louis website shows permits issued as early as October 8, 2019, and a completion date as late as April 15, 2020.[45] The description for one of the permits is listed as "Orlando Askins" and three are listed as "Orlando."[46] The City of St. Louis website lists this property as having been built in 1894, and therefore is likely subject to regulation under the TSCA RRP Rule. The owner is again listed as Shaw Holding Group, LLC.[47]

Complainant submits that during the time period Complainant claims in its Opposition that it had too limited time and resources to dedicate to this case, it appears Respondent was actively involved in renovating properties, at least two of which were likely regulated under TSCA RRP, still without firm certification. Likewise, despite citing the COVID-19 pandemic as justification for its non-responsiveness, it seems the renovations of at least two properties lasted well into the year 2020. That Respondent was apparently able to continue to renovate houses during the same time it claims it was unable to respond to EPA or file an answer, severely undermines the validity of Respondent's argument.

Complainant contends that Respondent has not proven excusable neglect for failure to file an answer. First, Respondent cites the pandemic as not being within the reasonable control of Respondent and Complainant agrees. However, Complainant contends that the pandemic had no impact on Respondent's repeated failures to participate in this case, nor file an answer. Complainant submits that the delays in this case were within the reasonable control of Respondent. Second, the length of delay in this case and the delay's impact on the proceedings is profound. Respondent's answer was due in November 2020. Third, Respondent's delays have caused substantial prejudice as they have caused Complainant to expend significant time and resources to attempt to engage Respondent, and to prepare the Complaint and Motion for Default. Respondent's delay has diverted Agency resources which could have been dedicated to other efforts to protect human health and the environment. To the extent Respondent is continuing to perform renovations on target housing without firm certification, harm is being caused to the TSCA RRP Program, the environment, and other regulated entities that perform renovations in compliance with applicable regulations.

[40] Exh. N to Complainant's Reply in Support of Default Order (visited March 24, 2021).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] Exh. O to Complainant's Reply in Support of Default Order.
[45] Exh. P to Complainant's Reply in Support of Default Order (visited on March 24, 2021).
[46] *Id.*
[47] *Id.*

3. Respondent Has Not Presented Any Meritorious Defenses to the Allegations in the Complaint

Complainant asserts that none of Respondent's purported defenses have merit, much less "a strong probability that litigating the defense will produce a favorable result." *Jiffy Builders, Inc.*, 8 E.A.D. 315 (EAB 1999), 1999 WL 345280, *5 ("Respondent would need to demonstrate not only that is has a defense that, if proved, would avoid liability, but also that it would likely prevail on its defense were it litigated.") *See also In re: Rybond*, 1996 WL 691675 (EAB 1996), *15 ("[I]t is Rybond's burden to establish that it clearly has a meritorious defense.").

Respondent's defense to Count I of the Complaint is that Complainant never inquired with Respondent as to whether one of its subcontractor laborers at the subject property had applied for or obtained certification from the EPA prior to performance of the renovation performance of the renovation of the property. According to Complainant, Respondent's defense to Count I fails for multiple reasons. 40 C.F.R. § 745.89(a)(1) requires that "firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling." The Complaint alleges that Respondent is a firm that performed the subject renovation for compensation. Complaint ¶ ¶ 20, 25-27. The Complaint does not allege that any other firm performed the subject renovation for compensation. Complainant contends that by its plain language, 40 C.F.R. § 745.89(a)(1) applies to all firms that perform renovations for compensation and, as such, even if one of Respondent's subcontractors or laborers had applied for firm certification, it would not obviate Respondent's requirement to obtain firm certification.

With regard to Count 2 of the Complaint, Respondent's defense is that Complainant is "solely relying on hearsay unwritten statements from an unqualified purported neighbor providing non-authenticated extrinsic evidence."[48] According to Complainant, Respondent's alleged defenses to Counts 3-8 of the Complaint are largely duplicative and can be summarized as follows:

a. That Complainant is "solely relying" on hearsay photographs[49] and hearsay videos[50] without documenting what time the photographs/videos were taken and without providing authenticity of the photographs/videos.
b. That Complainant is relying on "hearsay samples of dust"[51] from a neighboring property suggesting to depict uncontained "waste" from undefined renovation activities without providing authenticity that such samples of dust generated from Respondent's renovation of the subject property.

Complainant argues that although Respondent calls them defenses, Respondent is actually making a series of premature evidentiary objections. Complainant states that the standard for the admissibility of evidence under the Consolidated Rules is broad. 40 C.F.R.

[48] Respondent's Opposition to Default Order at p.11.
[49] For Counts 3, 4, 7, and 8.
[50] For Counts 4, 5, and 7.
[51] For Counts 6 and 8.

§ 22.22(a)(1) provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . " As the Environmental Appeals Board ("EAB" or "Board") has previously stated, an Administrative Law Judge "has broad discretion in determining what evidence is properly admissible."[52]

Complainant states that, "Hearsay evidence is clearly admissible under the liberal standards for admissibility in the [Consolidated Rules], which are not subject to the stricter rules Federal Rules of Evidence." *In re: William E. Comley, Inc.*, 11 E.A.D. 247 (EAB 2004), 2004 WL 78849, *15; 40 C.F.R. § 22.22(a). *See In re: J.V. Peters & Co.*, 7 E.A.D. 77, 104 (EAB 1997) (holding that hearsay evidence is not excluded by the Part 22 rules); *accord In re: Great Lakes Div. of National Steel Corp.*, 5 E.A.D. 355, 368-69 (EAB 1994). In *In re: Pyramid Chemical Co.*, 11 E.A.D. 657, 675 (EAB 2004), the Board noted that, "The documents Respondent challenges as hearsay are not to be excluded unless they are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Significantly, Respondent does not specify what aspects of the challenged documents are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." "The hearsay rule is not applicable to administrative hearings as long as the evidence upon which a decision is ultimately based is both substantial and has probative value." *Cohen v. Perales*, 412 F.2d 44, 51 (1969).

Complainant contends that although Respondent does not explain how photographs, videos, and dust samples could be hearsay, it is clear that hearsay is admissible under the Consolidated Rules. Further, Respondent does not argue that the statements, photographs, videos, or lead dust samples cited in the Complaint are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. *Pyramid Chemical Co*., 11 E.A.D. 657, 675 (EAB 2004).

Complainant states that it did not cite all of its evidence in its Complaint, nor was it required to under 40 C.F.R. § 22.14. ("A concise statement of the factual basis for each violation alleged.") There is no requirement to state in the Complaint the time photographs or videos were taken. Complainant argues that all of its evidence in support of Respondents' violations and the penalty, including, but not limited to, the statements, photographs, videos, and samples stated in the Complaint, is authentic[53], relevant, material, reliable and probative pursuant to 40 C.F.R. § 22.22(a)(1).

Complainant states that it was unable to find any case holding that evidentiary objections, raised in response to a Motion for Default, qualifies as a meritorious defense.[54] Complainant

[52] *In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997), 1997 WL 221388, *14 ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge . . .) (quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987). Absent an abuse of discretion, the Board will give an ALJ's rulings in this regard substantial deference." *J.V. Peters*, 7 E.A.D. at 99.

[53] *United States v. Mulnelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (authenticity of exhibit is established if enough evidence is introduced to show that the exhibit is what the proponent says it is); *Guam v. Ojeda*, 758 F.2d 403, 408 (9th Cir. 1985) ("the witness identifying the item in a photograph need only establish that the photograph is an accurate portrayal of the item in question.")

[54] Even in the context of Motions in Limine, Courts are loathe to exclude evidence until trial. *See In the Matter of Valimet, Inc.*, 2008 WL 4860831, EPCRA-09-2007-0021 (2008 Order on Complainant's Motion in Limine) citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill.1993). "Unless evidence meets

contends that Respondent cites no authority in support of its position and if evidentiary objections were all that is required as a meritorious defense, any Respondent could avoid default simply by lodging evidentiary objections. However, Complainant argues there are numerous cases rejecting actual defenses as failing to show a strong possibility of likelihood of success on the merits.[55] A classic example of a plausible meritorious defense can be found in the *Corbett* case under the Safe Drinking Water Act. *In the Matter of Mr. Harry Corbett, II*. 1994 WL 1048299 (EPA Region VI) (Initial Decision/Order Denying Second Motion for Default). In that case, the Court deemed meritorious Respondent's denial that it was providing water at the time alleged in the Complaint. *Id*. Complainant maintains that given the liberal standards for admissibility of evidence in administrative hearings, Respondent's generalized evidentiary objections cannot possibly clear the high hurdle of "a strong probability that litigating the defense will produce a favorable result." *Jiffy Builders, Inc.*, 8 E.A.D. 315 (EAB 1999), 1999 WL 345280, *5.

C. Analysis

1. Service of the Complaint

The Consolidated Rules provide that, with regard to domestic or foreign corporations, a partnership, or an unincorporated association which is subject to suit under a common name, service of a complaint shall be made upon an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process. 40 C.F.R. § 22.5(b)(1)(ii)(A). Service of a complaint is to be effectuated either personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. 40 C.F.R. § 22.5(b)(1)(i). Proof of service of a complaint is to be made by affidavit of the person making personal service, or by properly executed receipt, and is to be filed with the appropriate Regional Hearing Clerk immediately upon completion of service. 40 C.F.R. § 22.5(b)(1)(iii).

Respondent is a limited liability company registered and operating under the laws of the state of Missouri. Complaint ¶ 3. On October 25, 2006, pursuant to the Missouri Limited Liability Company Act, Mo. Rev. Stat. § 347.037 (2103), Respondent filed Articles of Organization with the Missouri Secretary of State.[56] The Articles of Organization name Orlando

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this high standard [clearly inadmissible for any purpose], evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id*. at 1400-1401.

[55] *See, e.g., In re Rocking BS Ranch, Inc.*, 2010 WL 1715635 (EAB 2010) (Final Decision and Order affirming default finding where respondent lacked an excuse for failing to file a timely answer and did not show strong possibility of likelihood of success on the merits); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 769-772 (EAB 2006) (affirming default finding where respondent lacked excuse for repeatedly failing to comply with administrative law judge's orders and failed to show strong possibility of likelihood of success on the merits); *In re B & L Plating, Inc.*, 11 E.A.D. 183, 191-92 (EAB 2003) (affirming default finding where respondent did not demonstrate "good faith" basis for failure to comply with presiding officer's prehearing exchange order); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 501, 506-08 (EAB 1993) (affirming default finding where respondent failed to comply with ALJ's prehearing exchange order); *Thermal Reduction*, 1992 WL 190247 (EAB 1992) (affirming default finding where respondent failed to filed answer to complaint and failed to respond to motion for default order.).

[56] Complainant's Memorandum in Support of Default Order, Exh. A, Articles of Organization (Oct. 25, 2006).

Askins as the organizer of Respondent and, as required by Mo. Rev. Stat. § 347.030 (2013), name National Registered Agents Inc. ("NRAI") as the registered agent of Respondent and agent registered in the State of Missouri for service of process.[57] The address for NRAI is listed in the Articles of Organization as 300-B East High Street, Jefferson City, Missouri 65101.[58] On February 4, 2013, NRAI filed with the Missouri Secretary of State a document entitled "Statement of Change of Business Office Address and Registered Office Address of a Registered Agent of a Foreign or Domestic for Profit or Nonprofit Corporation or a Limited Liability Company" ("Change of Address Form").[59] The Change of Address Form references Respondent as the business entity at issue and changes the address for Respondent's registered agent, NRAI, from its prior address of 300-B East High Street, Jefferson City, Missouri 65101, to its current address of 120 South Central Avenue, Clayton, Missouri 63105.[60]

On September 30, 2019, Complainant filed its Complaint with attachments.[61] On that same day, Complainant transmitted a file-stamped copy of the Complaint with attachments, by certified mail, return receipt requested, to Respondent's registered agent[62], NRAI, at the address provided in the Change of Address Form filed with the Missouri Secretary of State.[63] In addition, on October 8, 2019, EPA's counsel emailed a courtesy copy of the Complaint with attachments to Respondent's counsel.[64] Thereafter, the return receipt, or "green card," attached to the transmittal letter was returned to EPA evidencing that the Complaint and attachments had been served on Respondent's registered agent on October 4, 2019. On November 12, 2019, pursuant to 40 C.F.R. § 22.5(b)(1)(iii), Complainant filed a Proof of Service of Complaint and Notice of Opportunity for Hearing ("Proof of Service") with the Regional Hearing Clerk, attaching the "green card" signed by a representative of NRAI.[65] On that same day, Complainant transmitted a copy of the Proof of Service, by certified mail, return receipt requested, to Respondent's registered agent, the NRAI, at the address provided in the Change of Address Form.[66]

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[57] *Id.*; see also Mo. Rev. Stat. § 347.033 (2013) (registered agent appointed by limited liability company shall be agent upon whom any process, notice or demand may be served and when so served shall be lawful service on the limited liability company).
[58] *Id.*
[59] Complainant's Memorandum in Support of Default Order, Exh. C, Change of Address Form.
[60] *Id.*
[61] In accordance with 40 C.F.R. § 22.14(b), the Complaint was accompanied with a copy of the Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule and a full copy of 40 C.F.R. Part 22.
[62] The registered agent so appointed by a limited liability company shall be an agent of such limited liability company upon whom any service of process may be served and when so served, shall be lawful personal service on the limited liability company. Mo. Rev. Stat. § 347.033 (2013).
[63] Complainant's Memorandum in Support of Default Order, Exh. D, Transmittal Letter of Complaint and Notice of Opportunity for Hearing (Sept. 30, 2019).
[64] Complainant's Memorandum in Support of Default Order p. 7.
[65] See EPA's Administrative Enforcement Dockets Database, https://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/EAAFDE054219FF15852588B5005F94EB/$File/Proof%20of%20Service%20-%20Askins.pdf, Proof of Service of Complaint and Notice of Opportunity for Hearing, filed Nov. 12, 2019.
[66] Complainant's Memorandum in Support of Default Order, Exh. F, Transmittal Letter of Proof of Service of Complaint and Notice of Opportunity for Hearing (Nov. 12, 2019).

I am not persuaded by Respondent's argument that Complainant failed to provide the USPS with instructions that the Complaint was to be delivered to Respondent's registered agent by certified mail, return receipt requested. In its Reply in Support of its Motion for Default, Complainant provided the sworn declaration of Milady Peters, a paralegal in the EPA Region 7 Office of Regional Counsel, who mailed the Complaint and signed the Certificate of Service.[67] Complainant and Ms. Peters explained each step that Ms. Peters took in mailing the Complaint with considerable and thorough detail and also provided image exemplars of the steps.[68] In addition, the fact that return receipt was requested and obtained is evidenced by the green card that was signed by Respondent's registered agent on October 4, 2019, and returned by the USPS to the Complainant thereafter.[69] In addition to the return receipt, the USPS's article tracking number for the Complaint verifies that the postal product used to send the Complaint was "Certified Mail" and that it was delivered at 9:54 am on October 4, 2019, to Respondent's registered agent.[70]

The Consolidated Rules do not require the "certified mail" box to be checked on the green card for service to be effective. Respondent has never contested that it received the Complaint nor does it argue that it did not actually receive notice of the Complaint. In fact, Respondent tacitly admits it received the Complaint when it stated in its Opposition, "Respondent justifiably and mistakenly believed that it did not have to engage in legal counsel regarding this pending Complaint."[71] Moreover, in opposing the default motion, Respondent requests that the Presiding Officer "[g]rant leave for Respondent to provide a formal written answer to the Complaint within 30 days after Complainant's Motion for Default Order is respectfully denied."[72] By asking for leave to provide an answer to the Complaint, Respondent tacitly admits that it received the Complaint. As a result, I conclude that service of process of the Complaint complies with the Consolidated Rules and satisfies principles of due process. *Katzson Bros., Inc. v. U.S.EPA*, 839 F.2d 1396 (10th Cir. 1988); *See also In the Matter of Silky Associates, LLC*, Docket No. RCRA-03-2018-0131 (RJO) (service of complaint was in accordance with the Consolidated Rules where certified mailing of complaint directed and addressed to respondent limited liability company's registered agent at registered agent's address), *sua sponte review exercised on other grounds*, RCRA Appeal No. 21-02 (EAB), *and sua sponte review vacated*, RCRA (9006) Appeal No. 21-02 (EAB 2021); *In the Matter of Investment Properties, LLC*, Docket No. TSCA-01-2018-0017 (RJO May 23, 2019) (complaint sent by United Parcel Service to member of respondent LLC).

2. Valid Excuse or Justification for Failure to File an Answer

I am not persuaded by Respondent's arguments that it had a valid excuse or justification for its failure to file an answer. Respondent states that its delay in answering the Complaint was not intentionally designed to impede the judicial process. The EAB has held that lack of willful intent to delay the proceedings, by itself, does not excuse noncompliance with EPA's procedural

[67] Complainant's Reply in Support of Motion for Default, Exh. B.
[68] *Id.* at pp. 2-8; Exh. B to Complainant's Reply in Support of Motion for Default.
[69] Complainant's Reply in Support of Motion for Default, Exh. C and D.
[70] *Id.*, Exh. F.
[71] Respondent's Opposition to Default Order at p. 9.
[72] *Id*. at p. 15.

rules. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 321 (EAB 1999). 1999 WL 345280, * 5; *In re Rybond, Inc.*, 6 E.A.D. 614, 625 n. 19 (EAB 1996); *In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 106-07 (CJO 1990).

Respondent's claim that it "justifiably and mistakenly believed that it did not have to engage legal counsel regarding this pending Complaint because it was working under a resolution proposal it believed was the relevant Complaint provided under "Docket No. TSCA-**07-2018-0261** In the Matter of The Askins Development Group, LLC, Respondent" is not a valid justification for failure to file an answer to the Complaint. By making this claim, Respondent tacitly admits that it received the pending Complaint. The transmittal letter for the Complaint clearly states that the Complaint was filed September 30, 2019. Second, there are several paragraphs in the Complaint conspicuously describing: 1) how Respondent could resolve the proceeding by paying the proposed penalty (Complaint at ¶¶ 94-95); 2) that if Respondent did not pay the proposed penalty, it must file a written answer within thirty days (Complaint at ¶¶ 96-98); and the consequences of default (Complaint at ¶ 99). Given these explicit instructions, I find that Respondent's claim is not reasonable.[73]

Likewise, Respondent's belief that it was working under a resolution proposal under a different Complaint is inexplicable. The draft unsigned complaint bearing Docket No. TSCA-07-2018-0261[74] was sent to Respondent's registered agent on August 31, 2018, with a letter outlining the alleged violations and inviting Respondent to engage in settlement negotiations. In a letter dated October 5, 2018, Respondent's counsel sent a letter to EPA counsel referencing the August 31, 2018, letter and states that the lead attorney on the case is out of town until October 15, 2018, at which time he will further address the issues set forth in your letter and complaint. The letter also states, "Please refrain from filing the complaint until we have an opportunity to respond."[75] This statement affirms that Respondent's counsel knew the draft complaint bearing Docket No. TSCA-07-2018-0261was not filed.

Other than making a conclusory statement that it was attempting to comply with, or working under, a "resolution proposal," Respondent does not attempt to explain, or provide any evidence of what it did to advance the negotiations. Other than participating in a conference call on November 29, 2018, it does not appear that Respondent has done anything. Respondent admits that it has not provided any of the information sought initially in EPA counsel's November 30, 2018, email, nor provided a response to EPA counsel's April 17, 2019, email and Respondent also admits that it never made any contact with EPA between April 17, 2019, and February 18, 2021, the date that Complainant filed its Motion for Default. Respondent and its

[73] *See In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996) ("The fact that [respondent], who apparently is not a lawyer, chooses to represent himself does not excuse respondent from the responsibility of complying with the applicable rules of procedure") (quoting *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501, 505 (EAB 1993)).

[74] According to Complainant, the unsigned draft Complaint bearing the Docket No. TSCA-07-2018-0261 was never filed, nor purported to be filed. It was subsequently revised to adjust the allegations and the penalty downward based on additional information reviewed; the revised complaint was filed and served as Docket No. TSCA-02-2019-0280. Complainant's Reply in Support of Motion for Default Order, p. 11, n.10.

[75] Complainant's Reply in Support of Motion for Default Order, Exh. G.

counsel could not have reasonably thought negotiations would continue indefinitely without any progress on their end.

As for Respondent's claim that the COVID-19 pandemic constitutes a valid excuse or justification for its failure to file an answer, I am certainly sympathetic to any hardship experienced by Respondent. However, again, other than making a conclusory statement that it "was acting in good faith when it was proceeding with its limited time and resources to comply with Complainant's resolution proposal to provide the above-referenced matter and documents[76] when it became subjected to COVID-19 emergency extant in those particular states [California and Missouri]," Respondent does not attempt to explain, or provide any evidence of what it did to advance the negotiations. Moreover, the record shows that the prefiling negotiations, the filing of the Complaint, and the due date for filing the answer, all occurred before the beginning of the pandemic. The Complaint was served on October 4, 2019. The written answer was due by November 4, 2019.[77]

Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States regarding COVID-19 on January 31, 2020.[78] California Governor Gavin Newsome declared a state of emergency in California regarding COVID-19 on March 4, 2020.[79] Missouri Governor Mike Parsons declared a state of emergency in Missouri regarding COVID-19 on March 13, 2020.[80] All of these declarations occurred several months after Respondent's registered agent received the Complaint and, as such, I fail to see how the pandemic is a valid excuse or justification for Respondent's failure to respond to EPA's repeated contacts or its failure to file an answer to the Complaint.

In addition, the information on Respondent's website belies Respondent's claim that its time and resources were so limited or that it was working under a resolution proposal such that it could not respond to any of Complainant's requests from November 20, 2018, to the present, nor contact the Agency after April 2019, nor file an answer to the Complaint. Upon review of the record in this matter, it appears that three properties in the "Recently Sold" section of its website appear to have been renovated by Respondent between 2018 through 2020, the time period Respondent claims its "limited time and resources" prevented it from responding to this action: 4220 Botanical Avenue, St. Louis, Missouri 63110; 3952 Botanical Avenue, St. Louis, Missouri 63110; and 2356 Virginia Avenue, St. Louis, Missouri 63110.[81]

The City of St. Louis has a website that allows the public to search property information, including dates and types of permits (including building, electrical, mechanical, plumbing) by

[76] Respondent Suggestions in Opposition to Complainant's Motion for Default Order and Memorandum of Law in Support Thereof at pp. 8-9
[77] Thirty days from October 4, 2019, is Sunday, November 3, 2019. Pursuant to 40 C.F.R. § 22.7(a), 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.
[78] https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx
[79] https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf
[80] https://www.sos.mo.gov/CMSImages/Library/Reference/Orders/2020/20-02.pdf
[81] Complainant's Reply in Support of s Motion for Default, Exh. J, Exh. K, and Exh. L; see also n. 19, n. 20, and n. 21.

property address.[82] For the 4220 Botanical Avenue property, the City of St. Louis website shows permits issued as early as August 31, 2018, and a completion date as late as June 12, 2019. The description for two of the permits is listed as "Orlando Askins" and another is listed as "Orlando."[83]

For the 3952 Botanical Avenue property, the City of St. Louis website shows permits issued as early as February 11, 2019, and a completion date as late as September 10, 2020.[84] The description for two of the permits is listed as "Orlando."[85] The owner name that is listed for two permits is listed as Shaw Holding Group, LLC.[86] According to the Missouri Secretary of State, Orlando Askins is the manager of Shaw Holding Group, LLC.[87]

For the 2356 Virginia Avenue property, the City of St. Louis website shows permits issued as early as October 8, 2019, and a completion date as late as April 15, 2020.[88] The description for one of the permits is listed as "Orlando Askins" and three are listed as "Orlando."[89] The owner is again listed as Shaw Holdings Group, LLC.[90]

Thus, during the period of time Respondent claims it had limited time and resources to respond to any of Complainant's requests from November 20, 2018 to the present, nor contact the Agency after April 2019, nor file an answer to the Complaint, it appears that Respondent was actively renovating properties. Of particular note is that it appears Respondent was engaged in renovation activities in 2020, despite citing the COVID-19 pandemic as an excuse and or justification for its non-responsiveness. That Respondent was apparently able to continue renovation activities during the time period it claims it was unable to respond to Complainant or file an answer undermines the validity of Respondent's argument.

Finally, Respondent cites to the four-prong test for "valid excuse or justification" as set forth by the U.S. Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates, Ltd. Partnership*, 507 U.S. 380 (1992) (formally stated in the opinion as "excusable neglect"). Because the issue in the *Pioneer* case involved what constitutes "excusable neglect" under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure, it arguably is not applicable to this matter. Nevertheless, I am not convinced that Respondent demonstrated a valid excuse or justification for its failure to timely file a written answer to the Complaint.

First, Respondent cites the COVID-19 pandemic as not being within the reasonable control of Respondent and I agree. However, Respondent's answer to the Complaint was due several months prior to the COVID-19 state of emergency being declared in both California and Missouri. It appears Respondent was conducting renovation activities in the City of St. Louis in

[82] https://www.stlouis-mo.gov/data/address-search/index.cfm
[83] Complainant's Reply in Support of Its Motion for Default, Exh. M.
[84] *Id.*, Exh. N
[85] *Id.*
[86] *Id.*
[87] *Id.*, Exh. O.
[88] *Id.*, Exh. P.
[89] *Id.*
[90] *Id.*

2020 so I am not persuaded that the pandemic had an impact on Respondent's failure to file an answer and repeated failures to respond to Complainant's requests.

Second, Respondent's answer was due in early November 2019. Respondent's inaction and delays have caused Complainant to expend significant time and resources to attempt to engage Respondent, and to prepare the Complaint and Motion for Default. Respondent's delay has diverted Agency resources which could have been dedicated to other efforts to protect human health and the environment. To the extent Respondent is continuing to perform renovations, harm is being caused to the TSCA RRP Program, the environment, and other regulated entities that perform renovations in compliance with applicable regulations.

Lastly, Respondent admits that it has not provided any of the information requested by EPA counsel on November 30, 2018, and did not respond to the Agency's repeated contacts in February, March, and April 2019. Respondent made no effort to contact the Agency between April 2019 and March 2021 when the Agency filed its Motion for Default Order. As such, Respondent's actions and inactions belie its claim that it has acted in good faith.

3. Meritorious Defenses to the Allegations in the Complaint

As set forth by the EAB, "When a party commits a procedural violation that can give rise to a default, such as an untimely answer, a significant factor in the good cause determination is whether the purported defaulting party has any valid excuse for the procedural violation." *In re Pyramid Chemical Co.*, 11 E.A.D. 657, 2004 WL 3214481, *4, (EAB 2004). "In examining the totality of the circumstances for purposes of making a good cause determination, the Board may take into consideration the purported defaulting party's likelihood of success on the merits." *Id*., citing *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 322 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625, 629 (EAB 1996); *Midwest Bank & Trust Co.*, 3 E.A.D. 696, 699 (CJO 1991). "However, the burden falls on Respondent to demonstrate that there is more than the mere possibility of a defense, but rather a "strong probability" that litigating the defense will produce a favorable outcome." *In re Pyramid* at *5.

I am not swayed by Respondent's "meritorious defense" to Count 1 of the Complaint. The Complaint alleges that Respondent is a firm that performed the subject renovation for compensation. Complaint at ¶ 20, ¶¶ 25-27. Nowhere does the Complaint allege that any other firm performed the subject renovation for compensation. 40 C.F.R. § 745.89(a)(1) requires that "firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling." Thus, by its plain language, 40 C.F.R. § 745.89(a)(1) applies to all firms that perform renovations for compensation. As a result, even if one of Respondent's subcontractors or laborers had applied for firm certification, it would not obviate Respondent's requirement to also obtain firm certification.

With regard to Counts 2 through 8 of the Complaint[91], Respondent's meritorious defense is that Complainant is relying on various forms of hearsay without authenticating any of the

[91] The Complaint contained 9 Counts. Respondent's Opposition to Default Order does not assert any alleged defense(s) to Count 9.

evidence. Respondent's alleged defense with regard to Count 2 pertains to hearsay unwritten statements from a neighbor providing non-authenticated extrinsic evidence. Respondent's alleged defenses to Counts 3 through 8 pertain to hearsay photographs[92] and hearsay videos[93] without documenting what time the photographs/videos were taken and without providing authenticity of the photographs/videos. In addition, Respondent also contends that Complainant is relying on hearsay samples of dust[94] from a neighboring property suggesting to depict uncontained waste from undefined renovation activities without providing authenticity that such samples of dust generated from Respondent's renovation of the subject property.

Although Respondent refers to them as defenses, it appears that Respondent has made a series of premature evidentiary objections. The standard for the admissibility of evidence under the Consolidated Rules is quite broad. 40 C.F.R. § 22.22(a)(1) provides that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . ." As the Board has previously stated, "A presiding officer has broad discretion in determining what evidence is properly admissible and his rulings on such matters are entitled to substantial deference." *In re J.V. Peters & Co.*, 7 E.A.D. 77, 99 (EAB 1997), 1997 WL 221388, *14, quoting *In re Sandoz*, 2 E.A.D. 324, 332 (CJO 1987) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative judge because he is hearing the case first-hand and therefore, his rulings are entitled to considerable deference."). "The controlling inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable." *In re J.V. Peters*, 7 E.A.D. 77, 99 (EAB 1997), 1997 WL 221388, *14.

In the case of *In re William E. Comley, Inc.*, 11 E.A.D. 247 (EAB 2004), 2004 WL 78849, *14, the Board rejected as groundless Respondent's contention that the Region's sales figures for Respondent are inadmissible as hearsay evidence. The Board stated, "Hearsay evidence is clearly admissible under the liberal standards for admissibility of evidence in [Consolidated Rules], which are not subject to the stricter Federal Rules of Evidence." *See In re J.V. Peters & Co.*, 7 E.A.D. 77, 104, (EAB 2004) (holding that hearsay evidence is not excluded by the Part 22 rules). With regard to admissibility, the Board has previously concluded that, "The Consolidated Rules of Practice do not exclude hearsay from Agency hearings. Rather, they provide that: The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or other unreliable or of little probative value . . ." 40 C.F.R. § 22.22(a). *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355 (EAB 1994), 1994 WL 372214, *8, citing *In re The Celotex Corp*., TSCA Appeal No. 91-3, at 7 (CJO, Dec. 16, 1991); *In re Central Paint and Body Shop, Inc.*, RCRA Appeal No. 86-3, at 5 (CJO Jan. 7, 1987). "The Agency rule is consistent with federal court precedent that hearsay evidence is admissible in an administrative hearing." *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355 (EAB 1994), 1994 WL 372214, *8, citing *Richardson v. Perales,* 402 U.S. 389 (1971); *McClees v. Sullivan*, 879 F.2d 451, 453 (8th Cir. 1989).

[92] For Counts 3, 4, 7, and 8.
[93] For Counts 4, 5, and 7.
[94] For Counts 6 and 8.

In the *Pyramid Chemical* case, the EAB noted that "the documents Respondent challenges as hearsay are not to be excluded unless they are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. Significantly, Respondent does not specify what aspects of the challenged documents are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." *Pyramid Chemical Co.*, 11 E.A.D. 657, 675 (EAB 2004), 2004 WL 3214481, *14. "The hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value." *Cohen v. Perales*, 412 F.2d. 44, 51 (1969).

I am not convinced that Respondent's hearsay objections, without any additional information, rise to the level of having "a strong possibility that litigating the defense will produce a favorable result." *In re Jiffy Builders, Inc.*, 8 E.A.D. 315 (EAB 1999), 1999 WL 345280, *5. In *Jiffy Builders*, the Board said, "In our view, this necessarily means that Respondent would need to demonstrate not only that it has a defense that, if proved, would avoid liability, but also that it would likely prevail on its defense were it litigated." *Id*. Respondent has failed in this regard. In this matter, although Respondent does not explain how photographs, videos, and dust samples could be hearsay, it is clear that hearsay evidence is admissible under the Consolidated Rules. *In re William E. Comley, Inc.*, 11 E.A.D. 247 (EAB 2004), 2004 WL 78849, *14; *In re J.V. Peters & Co.*, 7 E.A.D. 77, (EAB 2004). Moreover, Respondent does not specify what aspects or portions of the challenged statements, photographs, videos, or lead dust samples cited in the Complaint are irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. *Pyramid Chemical Co.*, 11 E.A.D. 657, 675 (EAB 2004).

The Consolidated Rules require Complainant to include in the complaint "a concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(3). The Rules do not require Complainant to cite all of its evidence in the Complaint. In its Opposition, Respondent cites no legal authority in support of its position that evidentiary objections, raised in response to a Motion for Default, qualifies as a meritorious defense.[95] The EAB has issued numerous cases rejecting actual defenses as failing to show a strong possibility of likelihood on the merits. See, e.g., *In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04, at 12 (EAB April 21, 2010) (Final Decision and Order) (affirming default finding where respondent lacked an excuse for failing to file a timely answer and did not show strong possibility of likelihood of success on the merits); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 769-772 (EAB 2006) (affirming default finding where respondent lacked excuse for repeatedly failing to comply with administrative law judge's orders and failed to show strong possibility of likelihood of success on the merits); *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191-91 (EAB 2003) (affirming default finding where respondent did not demonstrate "good faith" basis for failure to comply with presiding officer's prehearing exchange order); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999) (affirming default finding where respondent failed to comply with presiding officer's prehearing exchange order and failed to offer the Board any reason to believe that it

[95] Even in the contexts of Motions in Limine, Courts are reluctant to exclude evidence until trial. *See In the Matter of Valimet, Inc.*, 2008 WL 4860831, EPCRA-09-2007-0021 (2008 Order on Complainant's Motion in Limine) citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id*. at 1400-1401.

would likely prevail on either of its defenses); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-28 (EAB 1996) (affirming default finding where respondent failed to comply with presiding officer's prehearing exchange and failed to demonstrate that there is a strong possibility that it would prevail on any of the counts of the Complaint if the case were heard on its merits). An example of a plausible meritorious defense is the *Corbett* case under the Safe Drinking Water Act. *In the Matter of Mr. Harry Corbett, II*, 1994 WL 1048299 (EPA Region VI) (Initial Decision/Order Denying Second Motion for Default). In that case, the Regional Judicial Officer deemed meritorious Respondent's denial that it was providing water at the time alleged in the Complaint. *Id*.

Given the liberal standards for admissibility of evidence in administrative hearings, Respondent has failed to show that its generalized, conclusory evidentiary objections show a strong possibility that litigating the defense will produce a favorable result.

III. Standards for Default

This proceeding is governed by the Consolidated Rules, 40 C.F.R. Part 22. Section 22.17 of the Consolidated Rules, provides in pertinent part:

> *(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 . . .
>
> *(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, [s]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 the 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 . . .

Complainant has afforded Respondent ample time and opportunity to remedy this matter, as well as made numerous attempts to contact Respondent to resolve the matter. 40 C.F.R. § 22.15(a) provides that in order for a respondent to contest any material fact in a complaint, to contend that the proposed penalty, compliance order or Permit Action is inappropriate, or to contend that it is entitled to judgment as a matter of law, Respondent must file a written answer to the complaint with the appropriate Regional Hearing Clerk within thirty (30) days after service of the complaint. Respondent did not settle the matter, file a written answer to the Complaint, or

request a hearing or extension of time to file an answer, within the thirty-day period as specified in 40 C.F.R. § 22.15(a).

Additionally, I also provided Respondent ample time and opportunity to resolve this matter. After Respondent filed its Opposition to Complainant's Motion for Default, I held two conference calls with the parties to discuss settlement efforts as well as any ability to pay claim that Respondent might want to make. Because there did not appear to be much progress made, I ultimately issued a Scheduling Order establishing deadlines for the parties to exchange information and documents and ordered the parties to confer and jointly file a status report by February 25, 2022. To date, Respondent has not complied with my November 16, 2021, Scheduling Order.

On May 16, 2022, I issued a Show Cause Order to Respondent, requiring that on or before May 31, 2022, Respondent show good cause for failing to file a timely answer to the Complaint and comply with the Scheduling Order dated November 16, 2021, and "why a default order should not be entered against it" in accordance with 40 C.F.R. § 22.17(a). To date, Respondent has not responded to the Show Cause Order.

Having failed to file an answer to the Complaint, failed to comply with the November 16, 2021 Scheduling Order, and failed to respond to the May 16, 2022 Show Cause Order, I find Respondent to be in default.[96] Based upon a review of the factual record and procedural history of this matter, I find that no "good cause" or basis exists as to why a default order should not be issued against Respondent. Default by the Respondent constitutes, for purposes of this proceeding only, an admission by the Respondent of all the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

IV. Findings of Fact and Conclusions of Law

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

1. Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 7.

2. On September 30, 2019, pursuant to Sections 16(a) and 409 of TSCA, 15 U.S.C. §§ 2615(a) and 2689, Complainant filed a nine (9) count Complaint and Notice of Opportunity for Hearing against Respondent in accordance with the Consolidated Rules of Practice, 40 C.F.R. Part 22.

[96] *See In re Jonway Motorcycle (USA) Co., Ltd., Shenke USA, Inc., Jonway Group Co., Ltd., Shanghai Shenke Motorcycle Co., Ltd., Zhejiang JM Star Shenke Motorcycle Co., Ltd., and Zhejiany Jonway Motorcycle Manufacturing Co., Ltd*, 2014 WL 6599562 (EAB 2014) (Respondents' failure to file an answer to the Complaint is sufficient grounds for finding default under 40 C.F.R. § 22.17(a)); *In re Pyramid Chemical Co.*, 11 E.A.D. 657 (EAB 2004), 2004 WL 3214481 ("The Board does not find "good cause" to excuse Respondent's untimely response to the Complaint; therefore, Respondent is found to be in default and is thus liable on all counts."); *In re B & L Plating, Inc*, 11 E.A.D. 183 (EAB 2003), 2003 WL 23019919, *6 ("Under the Consolidated Rules of Practice, default is appropriate where, as here, there has been a failure to comply with an ALJ's order.").

3. The Complaint alleged violations by Respondent of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. Part 745, Subpart E, in connection with a renovation performed at a property located at 3429 Missouri Avenue in St. Louis, Missouri.

4. The Complaint proposed to assess a penalty of $42,003 for the alleged violations.

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

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

7. The RRP Rule establishes work practice standards for renovations that disturb paint in target housing and child-occupied facilities and requires firms and individuals performing, offering, or claiming to perform such renovations to obtain EPA certification.

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

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

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

11. Section 401(17) of TSCA, 15 U.S.C. § 2681(17) and 40 C.F.R. § 745.103, defines "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 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

12. 40 C.F.R. § 745.83 defines "renovation" as the "modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement" as defined by 40 C.F.R. § 745.223. The term "*renovation*" includes (but is not limited to): the removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather stripping); and interim controls that disturb painted surfaces.

13. 40 C.F.R. § 745.83 defines "firm" as 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.

14. 40 C.F.R. § 745.83 defines "person" as any natural or judicial person, including any individual, corporation, partnership, or association; any Indian Tribe, State, or political subdivision thereof; any interstate body; and any department, agency, or instrumentality of the Federal Government.

15. 40 C.F.R. § 745.89(a)(2)(ii) states that on or after April 22, 2010, no firm may perform, offer, or claim to perform renovations without certification from EPA under § 745.89 in target housing or child-occupied facilities, unless the renovation qualifies for one of the exceptions identified in § 745.82.

16. 40 C.F.R. § 745.89(a)(1) provides that "firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling."

17. 40 C.F.R. § 745.89(d)(2) requires firms performing renovations to ensure a certified renovator is assigned to each renovation performed by the firm and that they discharge all the certified renovator responsibilities identified in 40 C.F.R. § 745.90.

18. The RRP Rule sets forth the regulations for "Work Practice Standards" that must be followed by firms performing renovations on target housing. Pursuant to 40 C.F.R. § 745.81(a)(4)(ii), all renovations must be performed in accordance with the work practice standards outlined in 40 C.F.R. § 745.85.

19. The regulation at 40 C.F.R. § 745.87(a) provides that failure or refusal to comply with any provision of 40 C.F.R Part 745, Subpart E, is a violation of Section 409 of TSCA, 15 U.S.C. § 2689. 40 C.F.R. § 745.87(d) provides that violators may be subject to civil and criminal sanctions pursuant to Section 16 of TSCA, 15 U.S.C. § 2615.

20. Section 16(a) of TSCA, 15 U.S.C. § 2615(a), as amended, and 40 C.F.R. § 745.87(d), authorizes a civil penalty of not more than $37,500 per day for violations of Section 409 of TSCA, 15 U.S.C. § 2689. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to $39,873 for violations that occur after November 2, 2015, and are assessed after February 6, 2019.

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

22. Beginning in early March of 2016, following a neighbor complaint, and pursuant to Section 11 of TSCA, 15 U.S.C. § 2610, representatives of the EPA Region 7 conducted an investigation regarding the renovation activities at 3429 Missouri Avenue, St. Louis, Missouri ("the Property"), to evaluate Respondent's compliance with TSCA and the requirements of the RRP Rule.

23. In early March of 2016, the City of St. Louis Lead Hazard Control Department also commenced an investigation into the renovation activities at the Property. The City of St. Louis lead inspector visited the Property and the surrounding area on multiple occasions between March 3 and March 9, 2016. He took photographs on March 3, 4, 7, and 9, 2019 and took soil and dust samples from a neighboring property on March 7, 2016. The City of St. Louis shared the results of its investigation with the EPA.

24. On March 15, 2016, an EPA inspector visited the Property, took photographs, and also collected statements, photographs, videos, voicemail recordings, and documents from a neighbor of the Property.

25. The EPA and City of St. Louis investigations are collectively referred to as the "EPA investigation."

26. At all times relevant to the Complaint, Respondent was engaged in a "renovation" of the Property as defined by 40 C.F.R. § 745.83. The EPA investigation revealed that the renovation, which included extensive gutting of the interior and the disturbance of greater than six square feet of interior painted surfaces, commenced at the Property on or before February 28, 2016, and continued until at least March 15, 2016.

27. At all times relevant to the Complaint, the Property was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17). The EPA investigation revealed that the Property was built in 1879.

28. At all times relevant to the Complaint, the Property was unoccupied. Children less than six years of age neither occupied nor were present at the Property at the time of Respondent's renovation and the EPA investigation.

Count 1 – Failure to Obtain Initial Firm Certification

29. Pursuant to 40 C.F.R. § 745.81(a)(2)(ii), firms performing renovations for compensation on or after April 22, 2010, must be certified by the EPA and have obtained initial certification prior to the performance of renovations, unless the renovation qualifies for one of the exceptions identified in 40 C.F.R. § 745.82. The regulation at 40 C.F.R. § 745.89(a)(1) requires firms that perform renovations for compensation to apply to the EPA for certification to perform renovations or dust sampling.

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

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

Count 2 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on February 29, 2016

32. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

33. The regulation at 40 C.F.R. § 745.85(a)(2)(i)(C) requires firms, before beginning a renovation, 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 area 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.

34. The EPA investigation revealed that Respondent failed to close windows in the work area on February 29, 2016. Specifically, statements obtained from a neighbor demonstrate open windows in the work area.

35. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

36. The EPA investigation revealed that Respondent, on February 29, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, statements obtained from a neighbor demonstrates releases of dust and debris from Respondent's renovation activities which migrated to an adjacent property, where a child or children resided.

37. Respondent's failure to close windows and contain waste on February 29, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 3 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 3, 2016

38. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

39. The regulation at 40 C.F.R. § 745.89(a)(2)(i)(C) requires firms, before beginning a renovation, 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 area 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.

40. The EPA investigation revealed that Respondent failed to close windows in the work area on March 3, 2016. Specifically, photographs taken by the City of St. Louis lead inspector on March 3, 2016, depict open windows in the work area.

41. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

42. The EPA investigation revealed that Respondent, on March 3, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, the videos taken by a neighbor on March 3, 2016, depict releases of dust and debris from Respondent's renovation activities which migrated to an adjacent property, in which a child or children resided.

43. Respondent's failure to close windows and contain waste on March 3, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 4 - Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 5, 2016

44. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

45. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

46. The EPA investigation revealed that Respondent, on March 5, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, the video and photographs taken by a neighbor on March 5, 2016, depict releases of dust and debris from Respondent's renovation activities.

47. Respondent's failure to contain waste on March 5, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 5 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 6, 2016

48. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

49. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

50. The EPA investigation revealed that Respondent, on March 6, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, the videos taken by a neighbor on March 6, 2016, depict releases of dust and debris from Respondent's renovation activities which migrated to an adjacent property, where a child or children resided.

51. Respondent's failure to contain waste on March 6, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 6 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 7, 2016

52. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

53. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

54. The EPA investigation revealed that Respondent, on March 7, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, photographs taken by the City of St. Louis lead inspector on March 7, 2016, depict uncontained waste from

renovation activities. Further, samples of dust from the neighboring property taken by the City of St. Louis lead inspector on March 7, 2016, tested positive for lead.

55. The regulation at 40 C.F.R. § 745.85(a)(2)(i)(C) requires firms, before beginning a renovation, 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 area 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.

56. The EPA investigation revealed that Respondent failed to close windows in the work area on March 7, 2016. Specifically, photographs taken by the City of St. Louis lead inspector on March 7, 2016, depict open windows in the work area.

57. Respondent's failure to contain waste and close windows on March 7, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 7 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 8, 2016

58. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

59. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

60. The EPA investigation revealed that Respondent, on March 8, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, the videos taken by a neighbor on March 8, 2016, depict releases of dust and debris from Respondent's renovation activities which migrated to an adjacent property, where child or children resided.

61. The regulation at 40 C.F.R. § 745.85(a)(2)(i)(C) requires firms, before beginning a renovation, 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 area 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.

62. The EPA investigation revealed that Respondent failed to close windows in the work area on March 8, 2016. Specifically, the videos and photographs taken by a neighbor on March 8, 2016, depict open windows in the work area.

63. The regulation at 40 C.F.R. § 745.85(a)(4)(ii) requires firms to collect, at the conclusion of each workday, the waste and store it under containment, in an enclosure, or behind a barrier that prevents the release of dust and debris out of the work area and prevents access to dust and debris.

64. The EPA investigation revealed that Respondent failed to collect, at the conclusion of the workday on March 8, 2016, the waste and store it under containment, in an enclosure, or behind a barrier that prevented the release of dust and debris out of the work area and prevented access to dust and debris. Specifically, photographs taken by the City of St. Louis lead inspector on the morning of March 9, 2016, depict uncontained waste in an open dumpster in the same location as that depicted in photographs taken by a neighbor on March 8, 2016.

65. Respondent's failure to contain waste, close windows, and properly collect and store waste on March 8, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 8 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standard in 40 C.F.R. § 745.85 on March 9, 2016

66. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

67. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

68. The EPA investigation revealed that Respondent, on March 9, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, photographs taken by the City of St. Louis lead inspector on March 9, 2016, depict uncontained waste from renovation activities.

69. The regulation at 40 C.F.R. § 745.85(a)(2)(i)(C) requires firms, before beginning a renovation, 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 area 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.

70. The EPA investigation revealed that Respondent failed to close windows in the work area on March 9, 2016. Specifically, photographs taken by the City of St. Louis lead inspector on March 9, 2016, depict open windows in the work area.

71. Respondent's failure to contain waste, close windows, and properly collect and store waste on March 9, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

Count 9 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 15, 2016

72. Pursuant to 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85.

73. The regulation at 40 C.F.R. § 745.85(a)(1) requires the posting of signs clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside the work area.

74. The EPA investigation revealed that Respondent, on March 15, 2016, failed to post signs clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside the work area. Specifically, photographs taken by an EPA representative on March 15, 2016, depict the lack of signage.

75. The regulation at 40 C.F.R. § 745.85(a)(4)(i) requires firms to contain waste from renovation activities to prevent releases of dust and debris before waste is removed from the work area for storage or disposal.

76. The EPA investigation revealed that Respondent, on March 15, 2016, failed to contain waste from renovation activities to prevent releases of dust and debris before waste was removed from the work area for storage or disposal. Specifically, photographs taken by an EPA representative on March 15, 2016, depict uncontained waste from renovation activities.

77. Respondent's failure to post signs and contain waste on March 15, 2016, is a violation of 40 C.F.R. § 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

78. Based upon the foregoing, I find that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, and the federal regulations at 40 C.F.R. Part 745, Subpart E, as set forth in Counts 1 through 9 of the Complaint, and that Respondent's violations provide the legal basis for the assessment against Respondent of a civil monetary penalty pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).

V. Determination of Civil Penalty Amount

Pursuant to 40 C.F.R. § 22.17(c), the relief proposed in the Complaint or Motion for Default shall be ordered unless it is "clearly inconsistent with the record of the proceeding or the Act." This provision also states that if a default order resolves all outstanding issues and claims in a proceeding, it shall constitute an initial decision. For purposes of calculating a civil penalty to be assessed in an initial decision, a Presiding Officer is required to determine the penalty

based on the evidence in the record of the case and in accordance with any applicable penalty criteria set forth in the underlying statute. 40 C.F.R. § 22.27(b). A Presiding Officer is also required to consider any applicable civil penalty guidelines. *Id*.

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires that the following factors be considered in determining the amount of any penalty assessed under Section 16: 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 other such matters as justice may require.

The EAB has held that, "as the proponent of an order seeking civil penalties in administrative proceedings, the EPA bears the burden of proof as to the appropriateness of a civil penalty." *In re: Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 320 (EAB 2000). The "appropriateness" of a civil penalty is to be determined in light of the statutory factors set forth in TSCA Section 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). *Id*., citing *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). However, although the EPA bears the burden of proof as to the appropriateness of a civil penalty, "it does not bear a separate burden with regard to each of the statutory factors." *Spitzer Great Lakes*, 9 E.A.D. at 320. Rather, in order to meet its burden and establish a *prima facie* case, the burden then shifts to the Respondent to rebut the EPA's case by showing that the proposed penalty is not appropriate either because the EPA "failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Id*., citing *New Waterbury*, 5 E.A.D. at 538-39, and *In re: Chempace Corp.*, 9 E.A.D. 119 (EAB 2000).

Section 16(a) of TSCA, 15 U.S.C. § 2615(a), as amended, and 40 C.F.R. § 745.87(d), authorize the assessment of a civil penalty of up to $37,500 per violation per day for violations of Section 409 of TSCA, 15 U.S.C. 2689. Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act, EPA amended its civil penalty policies to account for inflation. Memorandum from Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule* ("Bodine Memo") (January 11, 2018). Under the 2018 Civil Monetary Penalty Inflation Adjustment Rule, the maximum penalty for violations occurring after November 2, 2015, for which the penalty was assessed on or after February 6, 2019, is $38,873. *See* 84 Fed. Reg. 2058 (February 6, 2019). Accordingly, all penalty amounts should be adjusted for inflation by using the multipliers listed in Table A: Chart Reflecting Penalty Policy Inflation Adjustment Multipliers, of the Bodine Memo for all violations occurring after November 2, 2015. Bodine Memo at p. 3.

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

(2) upward or downward adjustments of the gravity based penalty component in light of a respondent's ability to pay the penalty, effect of the penalty on a respondent's ability to continue to do business, any history of prior such violations, the degree of a respondent's culpability, and such other matters as justice may require. ERRP at 9.

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

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

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

A. Complainant's Penalty Calculation

In the Complaint and Motion for Default Order, Complainant proposed the assessment of a civil penalty in the amount of $42,003 against Respondent for its violations of TSCA. In support of its Motion for Default, Complainant submitted the Declaration of Cassandra Mance,

the case review officer in this case, which provides a detailed description of her work in this matter, including the civil penalty calculation proposed in the Complaint and Motion for Default. Exhibit I to the Motion for Default ("Mance Declaration"). Ms. Mance's job description, qualifications, training, and experience working on lead-based paint matters is also summarized in her Declaration. Mance Declaration at ¶¶ 1-4.

Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1) and the ERPP provide that a separate civil penalty, up to the statutory maximum, can be assessed for each independent violation of TSCA. ERPP at 10. Section 16(a)(1) provides that "[e]ach day such violation continues shall, for the purposes of this subsection, constitute a separate violation of Section 2614 or 2689 of this title." 15 U.S.C. § 2615(a)(1). Per the ERPP, "[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." ERPP at 10. In this case, Complainant determined that Respondent committed nine independent violations of TSCA. Mance Declaration at ¶ 7.

As part of her job responsibilities, Ms. Mance calculated the proposed penalty for each of the violations alleged in the Complaint, taking into account the TSCA statutory factors by utilizing the penalty calculation methodology as set forth in the ERPP. Mance Declaration at ¶ 8. Utilizing the ERPP, Complainant calculated the proposed penalty of $42,003 as follows:

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

Nature: Chemical Control
Circumstance: Level 3a (medium probability of impact to human health/environment)[97]
Extent: Minor (no individual younger than 18 resided in Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 2 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on February 29, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[98] (medium probability of impacting human health/environment)

[97] ERPP at p. A-3 (Section VII).

[98] Appendix A of the ERPP does not specifically assign a circumstance level for violations of 40 C.F.R. § 745.89(d)(3). However, Appendix A of the ERPP does assign a circumstance level of 3a for the 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). Exh. H to Motion for Default Order, at p. A-3 (Section VII). Likewise, Appendix A of the ERPP assigns a circumstance level of 3a for the 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). To that end, the EPA's Office of Enforcement and Compliance Assurance, Office of Civil Enforcement has instructed RRP practitioners that violations of 40 C.F.R. § 745.89(d)(3), like violations of 40 C.F.R. §§ 745.89(d)(1) and (2), should be assigned a circumstance level of 3a. In this case, the assignment of a circumstance level of 3a to violations of 40 C.F.R. § 745.89(d)(3) is to Respondent's benefit. For Counts 2-9, the case team could have simply alleged work practice violations of 40 C.F.R. § 745.85, which carry a higher circumstance of 2a (Exh. H to Motion for Default Order, at pp. A-5-A-6), and therefore higher penalties under the ERPP (Exh. H to Motion for Default Order, at p. B-2). For example, Appendix

Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 3 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 3, 2016 - 40 C.F.R. § 745.89(d)(3)[99]

Nature: Chemical Control
Circumstance: Level 3a[100] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 4 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 5, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[101] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 5 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 6, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[102] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 6 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 7, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control

B of the ERPP assigns a level 3a violation, with a minor extent, a penalty of $4,500 before inflation. In contrast, Appendix B or the ERPP assigns a level 2a violation, with a minor extent, a penalty of $6,000 before inflation. Mance Declaration, fn. 15 at p. 9.

[99] EPA has decided to withdraw from Count 3 the specific allegation that Respondent failed to close windows in the work area on March 3, 2016. Regardless, Count 3 still stands because of the remaining allegation that Respondent violated 40 C.F.R. § 745.85(a)(4)(i), and therefore 40 C.F.R. § 745.89(d)(3), on March 3, 2016, by failing to contain waste. Mance Declaration at ¶ 24, fn. 16.

[100] See fn. 98, above.

[101] See fn. 98, above.

[102] See fn. 98, above.

Circumstance: Level 3a[103] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 7 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 8, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[104] ((medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 8 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 9, 2016 - 40 C.F.R. § 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[105] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Count 9 – Failure to Ensure Renovations Were Performed in Accordance with the Work Practices Standards in 40 C.F.R. § 745.85 on March 15, 2016 - 40 C.F.R.§ 745.89(d)(3)

Nature: Chemical Control
Circumstance: Level 3a[106] (medium probability of impacting human health/environment)
Extent: Minor (no individual younger than 18 resided in the Property at time of renovation)
GBP Penalty Matrix: $4,500

Mance Declaration at ¶¶ 16-51. Additionally, Complainant took into consideration, but did not increase or decrease, the proposed penalty in light of Respondent's ability to pay the penalty/ability to continue in business, any history of prior such violations by Respondent, the degree of Respondent's culpability, and such other matters as justice may require, including the Respondent's voluntary disclosure of violations, attitude during negotiations, and any other case-specific facts that justify further reduction of the penalty. Mance Declaration at ¶ 53. More specifically, as part of her Declaration, Ms. Mance stated that Respondent had no history of such prior violations or an enhanced degree of culpability so no upward adjustment was made to the

[103] See fn. 98, above.
[104] See fn. 98, above.
[105] See fn. 98, above.
[106] See fn. 98, above.

penalty. *Id.* at ¶ 54. Ms. Mance stated that because Respondent did not engage the EPA in pre-filing negotiations prior to or after the filing of the Complaint, Respondent never provided EPA with any of the financial documentation it requested. As a result, she had inadequate information to determine any adjustments to the gravity-based penalty based upon Respondent's ability to pay or to continue in business, degree of culpability, or attitude during negotiation. *Id*. at ¶ 53. Additionally, since Respondent did not respond to EPA's multiple requests for financial information in order for it to evaluate Respondent's ability to pay prior or after the filing of the Complaint, Ms. Mance stated she had inadequate information whether the penalty warranted a downward adjustment to reflect Respondent's ability to pay or continue in business. *Id*. Ms. Mance also considered, consistent with TSCA and the LBP Consolidated ERPP, whether an economic benefit component should be added to the proposed civil penalty and because she determined that the economic benefit to Respondent was not significant, an economic benefit component was not added to the proposed penalty. *Id*. at ¶ 56.

The total penalty before inflation for the nine (9) counts is $40,500. Pursuant to the January 11, 2018, Bodine Memo and transmittal of the 2018 Civil Monetary Inflation Adjustment Rule, because the alleged TSCA lead-based paint violations occurred after November 2, 2015, and penalties were assessed after January 15, 2018, Ms. Mance applied the inflation multiplier of 1.03711, for the TSCA lead-based paint violations, to the total penalty. The resulting penalty with inflation, rounded to the nearest dollar[107], is $42,003 ($40, 500 x 1.03711).

B. Analysis of Penalty Calculation

40 C.F.R. § 22.17(c) provides that upon a finding of default by a Respondent, the relief proposed in a complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of proceeding or the statute authorizing the proceeding. Based upon the record of this case, an evaluation of the TSCA statutory factors with regard to Respondent and Respondent's violations, and in consideration of the ERPP, I have determined that the $42,003 penalty amount requested and as calculated by Complainant is appropriate and is not clearly inconsistent with regard to TSCA, the Residential Lead-Based Paint Hazard Reduction Act, or the RRP Rule.

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

[107] The 2018 Civil Monetary Inflation Adjustment rule states that:

> [The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015] requires agencies to: (1) Adjust the level of statutory civil penalties with an initial "catch-up" adjustment through an interim final rulemaking; and (2) beginning January 15, 2017, make subsequent annual adjustments for inflation. The purpose of the 2015 Act is to maintain the deterrent effect of civil penalties by translating originally enacted statutory civil penalty amounts to today's dollars **and rounding statutory civil penalties to the nearest dollar**. 83 Fed. Reg. 1191 (Jan. 10, 2018) (emphasis added).

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

Count 1 – Failure to Obtain Initial Firm Certification

Under 40 C.F.R. § 745.89(a), firms that perform renovations for compensation in target housing must apply to EPA for certification for renovation or dust sampling pursuant to 40 C.F.R. § 745.81(a)(2)(ii), which provides that no firm may perform, offer, or claim to perform renovations in target housing or child-occupied facilities without certification from EPA under § 745.89. Prior to filing the Complaint, the EPA confirmed that it had no record of Respondent applying for or obtaining certification from EPA pursuant to 40 C.F.R. § 745.89(a)(1) prior to performance of the renovation of the Property. Mance Declaration at ¶ 16. Respondent's failure to obtain RRP certification prior to performing renovation work at 3429 Missouri Avenue in St. Louis, Missouri constitutes violations of 40 C.F.R. §§ 745.89(a) and 745.81(a)(2)(ii). Penalties for this violation may be assessed pursuant to Section 16 of TSCA.

Because these requirements are found in 40 C.F.R. Part 745, Subpart E, they are "chemical control" in nature, violation of which poses a medium probability of impacting human health and the environment. Appendix A of the ERPP assign this alleged violation a circumstance level of 3a. In accordance with the ERPP, for housing units that are not occupied by children less than eighteen years of age or pregnant women, the appropriate extent is minor. Accordingly, under the ERPP, the penalty for a minor, level 3a violation is $4,500.

Counts 2 to 9 – Work Practice Violations

Counts 2 through 9 of the Complaint address Respondent's violations of certain work practice requirements set forth in § 745.85 with regard to renovation performed at the Missouri Avenue property in 2016. More specifically, the Counts address:

Count 2 – Failure to ensure renovations were performed in accordance with the work practice requirements on February 29, 2016

- Failure to close and cover all windows and doors in the work area
- Failure to contain renovation activity waste prior to removal from work area

Count 3 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 3, 2016[108]

- Failure to contain renovation activity waste prior to removal from work area

Count 4 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 5, 2016

- Failure to contain renovation activity waste prior to removal from work area

[108] EPA has decided to withdraw from Count 3 the specific allegation that Respondent failed to close windows in the work area on March 3, 2016. Regardless, Count 3 still stands because of the remaining allegation that Respondent violated 40 C.F.R. § 745.85(a)(4)(i), and therefore 40 C.F.R. § 745.89(d)(3), on March 3, 2016, by failing to contain waste. Mance Declaration at ¶ 24, fn. 16.

Count 5 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 6, 2016

- Failure to contain renovation activity waste prior to removal from work area

Count 6 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 7, 2016

- Failure to close and cover all windows and doors in the work area
- Failure to contain renovation activity waste prior to removal from work area

Count 7 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 8, 2016

- Failure to close and cover all windows and doors in the work area
- Failure to contain renovation activity waste prior to removal from work area
- Failure to collect renovation activity waste at the end of the workday and properly store it

Count 8 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 9, 2016

- Failure to close and cover all windows and doors in the work area
- Failure to contain renovation activity waste prior to removal from work area

Count 9 – Failure to ensure renovations were performed in accordance with the work practice requirements on March 15, 2016

- Failure to post signs in the work area
- Failure to contain renovation activity waste prior to removal from work area

Nature of violation – With regard to Respondent's violations in Counts 2 through 9, I conclude that it is appropriate to characterize these requirements 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.[109]

Circumstance level – According to Complainant, Appendix A of the ERPP does not specifically assign a circumstance level for violations of 40 C.F.R. § 745.89(d)(3). However, Appendix A of the ERPP does assign a circumstance level of 3a for the 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). ERPP at p. A-3 (Section VII). Likewise, Appendix A of the ERPP assigns a circumstance level of 3a for the 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). *Id*. To that end, the EPA's Office of Enforcement and Compliance Assurance, Office of Civil Enforcement has instructed RRP practitioners that violations of 40 C.F.R. § 745.89(d)(3), like violations of 40 C.F.R. §§ 745.89(d)(1) and (2), should be assigned a circumstance level of 3a. In this case, the assignment of a circumstance level of 3a to violations of 40 C.F.R. § 745.89(d)(3) is to

[109] ERPP at p. 14.

Respondent's benefit. For Counts 2-9, the EPA case team could have simply alleged work practice violations of 40 C.F.R. § 745.85, which carry a higher circumstance of 2a. For example, Appendix B of the ERPP assigns a level 3a violation, with a minor extent, a penalty of $4,500 before inflation. In contrast, Appendix B of the ERPP assigns a level 2a violation, with a minor extent, a penalty of $6,000 before inflation. Mance Declaration, fn. 15 at p. 9. The record in this matter supports a finding that the circumstance level for these violations is 3a (medium probability of impacting human health and the environment).

Extent of violation – At the time of renovation, the property was unoccupied and no individuals under the age of eighteen resided in or were present in the premises. I conclude that the extent of harm is minor.

GBP for Counts 2 through 9 – Based upon the aforesaid analysis, I conclude that the following gravity-based penalties are appropriate for Respondent's violations:

Count 2	$4,500
Count 3	$4,500
Count 4	$4,500
Count 5	$4,500
Count 6	$4,500
Count 7	$4,500
Count 8	$4,500
Count 9	$4,500

2. Upward or Downward Adjustments

Complainant does not seek and I find that the record does not warrant any upward or downward adjustment to the gravity-based penalty with respect to the factors of Respondent's history of prior violations, Respondent's culpability or such other matters as justice may require. As represented by the Complainant, no upward adjustment to the penalty was appropriate because Respondent had no history of prior such violations or an enhanced degree of culpability. Mance Declaration at ¶ 54. Complainant also concluded as part of its penalty calculation that Respondent did not incur any significant economic benefit as a result of its non-compliance with TSCA. *Id*. at ¶ 56. I find no evidence in the record to warrant either an upward or downward adjustment to the proposed penalty based upon the factor "other matters as justice may require."

Complainant stated that because Respondent did not engage EPA after the lone pre-filing conference on November 29, 2018, nor after the filing of the complaint, and because Respondent never provided EPA any of the financial documentation it requested, Complainant had inadequate information to determine whether the penalty warranted a downward adjustment to reflect Respondent's ability to pay or continue in business. Mance Declaration at ¶ 53. It has been consistently held that a respondent's ability to pay a proposed penalty may be presumed until it is put at issue by respondent. *See In re James Ikegwu and Martha Ikegwu*, Docket TSCA-03-2011-0217 (RJO Decision), April 2014; *In re Spitzer Great Lakes*, 9 E.A.D. 302, 319-321 (EAB 2000); *In re: New Waterbury, Ltd*., 5 E.A.D. 529, 541 (EAB 1994). This stems from the

premise that since the complainant's ability to obtain financial information about a respondent is limited at the outset of the case, a respondent's ability to pay is presumed until respondent puts it at issue. Furthermore, where a respondent does not raise its ability to pay as an issue in its answer or does not produce any evidence to support such a claim, a complainant may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived. *In re Spitzer Great Lakes*, 9 E.A.D. 302, 319-321 (EAB 2000). Here, Respondent neither filed an answer nor submitted any financial documents for consideration of an inability to pay, despite having been given multiple opportunities to do so. The record shows that Complainant made at least five attempts to obtain ability to pay information from Respondent prior to the Complaint being filed on September 30, 2019. After the Motion for Default and Respondent's Opposition to the Motion for Default were filed, Complainant continued to request that Respondent submit financial documentation to support an inability to pay claim. Moreover, I issued a Scheduling Order on November 16, 2021, ordering Respondent to submit all documents, information and responses to Complainant in support of an inability to pay claim if Respondent intends to make such a claim. This information was to be submitted by February 11, 2021, but Respondent failed to comply with my Scheduling Order and to date has not submitted any of the information. As a result, I find that a downward adjustment to the gravity-based penalty component is not warranted.

3. Inflation Adjustment

The total penalty before inflation for Counts 1 through 9 is $40,500. As stated above, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act, EPA amended its civil penalty policies to account for inflation. Memorandum from Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule* ("Bodine Memo") (January 11, 2018). Under the 2018 Civil Monetary Penalty Inflation Adjustment Rule, the maximum penalty for violations occurring after November 2, 2015, for which the penalty was assessed on or after February 6, 2019, is $38,873. *See* 84 Fed. Reg. 2058 (February 6, 2019). Accordingly, all penalty amounts should be adjusted for inflation by using the multipliers listed in Table A: Chart Reflecting Penalty Policy Inflation Adjustment Multipliers, of the Bodine Memo for all violations occurring after November 2, 2015. Bodine Memo at p. 3.

Because the TSCA lead-based paint violations occurred after November 2, 2015, and penalties were assessed after January 18, 2018, Complainant applied the inflation multiplier of 1.03711 for TSCA lead-based violations, to the total penalty. Mance Declaration at ¶ 58 citing Bodine Memo at p. 3 and Table A, p. 13. The resulting penalty, with inflation, rounded to the nearest dollar[110], is $42,003 ($40,500 x 1.03711). I conclude that the penalty amount was properly adjusted in accordance with the 2018 Civil Monetary Penalty Inflation Adjustment Rule and Bodine Memo.

[110] See fn. 107, above.

Violation	Extent	Circumstance	Gravity Based Penalty
Count 1	Minor	Level 3a	$4,500
Count 2	Minor	Level 3a	$4,500
Count 3	Minor	Level 3a	$4,500
Count 4	Minor	Level 3a	$4,500
Count 5	Minor	Level 3a	$4,500
Count 6	Minor	Level 3a	$4,500
Count 7	Minor	Level 3a	$4,500
Count 8	Minor	Level 3a	$4,500
Count 9	Minor	Level 3a	$4,500
Subtotal			$40,500
Inflation Multiplier of 1.03711			$1,503
Total Penalty With Inflation Multiplier Rounded to the Nearest Dollar			**$42,003**

CONCLUSION

As noted above, the Rules of Practice provide that upon issuing a default order, "[t]he relief proposed in the complaint or the motion for default order shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or [the statute authorizing the proceeding]." 40 C.F.R. § 22.17(c). I find that Complainant's rationale for the penalty calculation is neither clearly inconsistent with the record nor clearly inconsistent with TSCA. Accordingly, for the foregoing reasons, and pursuant to 40 C.F.R. § 40.17(c), I will assess the $42,003 penalty requested in the Complaint and Motion for Default.

ORDER

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

1. Respondent, The Askins Development Group, LLC, is assessed a civil penalty in the amount of $42,003 and ordered to pay the civil penalty as directed in this Order.

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

a. All payments made by check and sent by regular U.S. Postal Service Mail shall be addressed and mailed to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000
Contact: Customer Service (513) 487-2091

b. All payments made by check and sent by private commercial overnight delivery service shall be addressed and sent to:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979076
St. Louis, MO 63101
Contact: Natalie Pearson
(314) 418-4087

c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

d. All electronic payments made through the Automated Clearinghouse (ACH), also known as REX or Remittance Express), shall be directed to:

PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 – checking
Environmental Protection Agency
Account 310006
CTX Format
Contact: Jesse White (301) 887-6548

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

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

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

   and

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

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

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

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

IT IS SO ORDERED.

KARINA BORROMEO

Digitally signed by KARINA BORROMEO
Date: 2022.09.26 07:55:18 -05'00'

Date

Karina Borromeo
Regional Judicial Officer/Presiding Officer