UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania

U.S. EPA-REGION 3-RHC
FILED-3MAR2020AM11:47

In the Matter of:	:	
Bottos Construction, Inc.	:	**U.S. EPA Docket No. TSCA-03-2019-0058**
Respondent.	:	

INITIAL DECISION AND DEFAULT ORDER

On March 28, 2019, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency, Region 3 ("Complainant") commenced an administrative proceeding against Bottos Construction, Inc. ("Respondent") with the filing of an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") pursuant to Sections 16(a) and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2615(a) and 2689, the federal regulations set forth at 40 C.F.R. Part 745, Subpart E, and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("*Consolidated Rules of Practice*"), 40 C.F.R. Part 22. The Complaint alleged in nine (9) counts that Respondent had violated TSCA in connection with lead-based paint renovations performed at four properties located at: 822 S. 5th Street, Philadelphia, Pa.; 815 N. Woodbine Ave., Narbeth, Pa.; 1602 Bainbridge Street, Philadelphia, Pa.; and 2023-25 Rittenhouse Square, Philadelphia, Pa. The Complaint proposed the assessment of a civil penalty in the amount of $27,879.00 for Respondent's violations.

On September 17, 2019, Complainant filed a Motion for Default requesting the issuance of an Order finding the Respondent in default for failure to file an Answer to the Complaint and assessing a civil penalty in the amount of $9,573.00.[1] On January 8, 2020, the Presiding Officer issued an Order for Supplemental Briefing pursuant to which Complainant was ordered to provide a declaration or affidavit of a penalty witness in support of its proposed civil penalty calculation and to provide additional

[1] As explained in more detail, *infra*, subsequent to the filing of the Complaint, Complainant obtained additional information from Respondent concerning the four renovations and, based on the new information, Complainant revised its penalty calculation resulting in a new proposed civil penalty of $9,573.00.

information concerning the service of the Complaint on the Respondent. On January 30, 2020, Complainant filed its response to the Order for Supplemental Briefing. As of the date of this Default Order, Respondent has not filed with EPA Region 3's Regional Hearing Clerk: a Motion for leave to file an Answer; a response to the Motion for Default; or a response to the Order for Supplemental Briefing.

Based upon the record of this matter and for the reasons set forth, *infra*, Complainant's Motion for Default is **GRANTED**. Pursuant to Rule 22.17(a) and (c) of the *Consolidated Rules of Practice*, 40 C.F.R. § 22.17(a) and (c), Respondent is held to be in default for failure to file an Answer to the Complaint and is assessed a civil penalty in the amount of $9,573.00 for its violations of TSCA.

I. Standard for Default

Rule 22.17(a) of the *Consolidated Rules of Practice*, 40 C.F.R. § 22.17(a), provides that a party may be found in default upon failure to file a timely answer to a complaint and that default by a respondent constitutes, for purposes of the pending action, an admission of all facts alleged in the complaint and a waiver of a respondent's right to contest such factual allegations. When a Presiding Officer finds that a default has occurred, he or she "shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c). A default order shall constitute an initial decision if it resolves all outstanding issues and claims in the proceeding, and 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 underlying statute authorizing the proceeding. Id.

II. Service of Complaint

The *Consolidated Rules of Practice* require that, with regard to domestic corporations, 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 the 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). Service of a complaint is complete when the return receipt is signed. 40 C.F.R. § 22.7(c).

Respondent is a Pennsylvania corporation with its principal place of business located at 1005 Sussex Boulevard in Broomall, Pennsylvania. (Complaint at ¶ 12; and Motion for Default – Exhibit G).

On March 28, 2019, Complainant served a copy of the Complaint via certified mail with return receipt requested on "Constantinos Bottos, President of Bottos Construction, Inc.."[2] Id. The USPS tracking system indicates that the Complaint package was received at Respondent's Broomall, Pennsylvania office on April 8, 2019. Id. The certified mail return receipt green card was signed by an individual named "Melissa Welsh." (Certificate and Proof of Service April 12, 2019).[3]

As an attachment to its Motion for Default, Complainant provided corporate research, in the form of a Westlaw company report, which listed "Constantinos Bottos" as a "principal" and not the "president" of Respondent. (Motion for Default – Exhibit G). Rather, the Westlaw Report listed "Dino Bottos" as Respondent's "president." Id. The Order for Supplemental Briefing required Complainant to explain the apparent discrepancy and to explain whether the March 28, 2019 service of the Complaint upon the Respondent was in compliance with the *Consolidated Rules of Practice*.

In its response to the Order for Supplemental Briefing, Complainant argued that service of the Complaint was valid under the *Consolidated Rules of Practice*. First, Complainant noted that the EPA Region 3 personnel who conducted inspections of Respondent's company and interacted with the company formed the opinion that "Constantinos Bottos" and "Dino Bottos" are the same person, and that the name "Dino Bottos" is used as a nickname. (Complainant's Memorandum of Law in Support of Motion for Default at 1-3). Complainant supplied the declaration of Valerie Franklyn, an EPA Region III Environmental Engineer and Inspector, who declared that, based upon her interactions with the company, it is her "understanding that Constantinos Bottos uses 'Dino' as a nickname, and that references to 'Mr. Bottos', 'Dino Bottos' and Constantinos Bottos' in the various inspection related documents in the investigative case file are referring to the same individual." (January 24, 2020 Declaration of Valerie Franklyn at ¶ 5). Complainant also provided documents from its case file including, inspection reports, correspondence, tax returns, financial information, and government filings,

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[2] Complainant also served a copy of the Complaint on Richard S. Clewell, Esq. of the Clewell Law Firm located at 1617 JFK Boulevard in Philadelphia, Pennsylvania. The return receipt green card for this mailing was signed by Robert S. Clewell on April 3, 2019. With regard to Richard S. Clewell, there is nothing in the record to indicate that Mr. Clewell is either an officer, partner or managing or general agent of Bottos Construction, Inc. Additionally, the record of this matter contains no information to indicate that Mr. Clewell was either authorized by appointment or by Federal or State law to receive service of process on behalf of the Respondent. Rather, the record indicates that Mr. Clewell is an attorney representing the Respondent. (Complainant's Memorandum of Law in Support of Motion for Default – Attachment 6).

[3] The EAB has held that "proper service [under the *Consolidated Rules of Practice* – Part 22] on a corporation by certified mail does not require that the named addressee be the person who signs the return receipt." *In re: Peace Industry Group (USA) Inc.*, 17 E.A.D. 348, 363 (2016). Rather, the EAB has noted that the *Consolidated Rules of Practice* are silent as to who must sign the return receipt and the *Rules* only require that "in serving a corporation, if EPA properly addresses and mails the complaint by certified mail, and an individual at that address signs the return receipt, service is complete."

which it argued clearly show that "Constantinos Bottos" and "Dino Bottos" are the same person. For example, an EPA inspection report indicates that Mr. Bottos identified himself as Constantinos Bottos when contacted by EPA inspectors to schedule an office visit and meeting. (Complainant's Memorandum of Law in Support of Motion for Default - Attachment 1 at 2-3). However, in a subsequent email exchange with EPA, Mr. Bottos acknowledged that he was the individual who was present during the EPA inspection and provided additional information to EPA's inspectors, yet he chose to sign his email utilizing the name "Dino."

Complainant also argued that, even if Constantinos Bottos and Dino Bottos are two different people, the service of the Complaint was valid under the *Consolidated Rules of Practice* in that information in EPA's files contradicts the information provided in the Westlaw report. More specifically, Complainant noted that Constantinos Bottos is listed as the "president" of Respondent on a federal tax return prepared for tax year 2017 and supplied to EPA by Respondent.

Additionally, Complainant argued that service of the Complaint on Constantinos Bottos is valid given his position of responsibility and apparent authority to represent Respondent in connection with its dealings with the EPA. (Complainant's Memorandum in Support of Motion for Default at 4.) Complainant noted that the phrase "managing or general agent" is not defined in the *Consolidated Rules of Practice*. However, the EPA Environmental Appeals Board (EAB) has held that, in cases where no particular individual has been formally designated or titled as an agent of a company, the *Rules* permit service of a Complaint to be made upon "a representative so integrated with the organization that he will know what to do with the papers . . . who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service." (Id. at 5 (quoting *In re Las Delicias Community*, 14 E.A.D. 382, 393-94 (EAB 2009)). See also *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.,* 840 F.2d 685, 688 (9th Cir. 1988)). Complainant argued that, although Constantinos Bottos is not officially designated as a "managing or general agent" of Respondent, his interactions with EPA clearly demonstrated that he possesses "independent discretion, responsibility, integration and continuity within the company" at a level sufficient to satisfy the standard set forth by the EAB.

Finally, Complainant noted in its Memorandum that the record of this matter contains evidence indicating actual receipt of the Complaint by Respondent. More specifically, Complainant cites voice mail messages and written communications from Mr. Bottos subsequent to the service of the Complaint that specifically mention EPA's enforcement action. Although this type of evidence does not in and of

itself establish proper service under the *Consolidated Rules of Practice*, the EAB has recognized that federal courts have considered actual receipt as a factor to be utilized for purposes of determining whether service of process is valid. See *In re Las Delicias Community,* 14 E.A.D. at 396-97, citing *Direct Mail*, 840 F.2d at 688. See also *American Institute of Certified Public Accountants v. Affinity Card, Inc.,* 8 F. Supp. 2d 372, 377 (S.D.N.Y. 1998) (While actual notice of a pending action cannot by itself cure service that is otherwise defective, actual receipt of service is nonetheless an important factor in determining the effectiveness of service.)

Based upon my review of the record of this matter, I find Complainant's arguments persuasive. More specifically, I find that Complainant's service of the Complaint on "Constantinos Bottos" was valid under the *Consolidated Rules of Practice* in that: Constantinos Bottos demonstrated that he is "a representative so integrated" with the Respondent that it is fair, reasonable and just to conclude that he possessed the authority to accept service of the Complaint on behalf of the Company; actual receipt of service of the Complaint on Respondent is part of the record of this matter; and the record contains sufficient evidence from which it is reasonable to conclude that "Constantino Bottos" and "Dino Bottos" are the same person. Therefore, I conclude that, on April 8, 2019, the Complaint was lawfully and properly served on the Respondent at Respondent's corporate offices via certified mail, return receipt requested, in accordance with 40 C.F.R. § 22.5(b)(1)(i) and (ii)(A).

III. Findings of Fact and Conclusions of Law

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based upon a review of the record of this matter, I make the following Findings of Fact and Conclusions of Law:

1. Complainant is the Director of the Land and Chemicals Division of the United States Environmental Protection Agency, Region III.
2. Respondent, at all times relevant to this matter, was a Pennsylvania corporation with its principal place of business located at 1005 Sussex Boulevard in Broomall, Pennsylvania.
3. On March 28, 2019, pursuant to Sections 16(a) and 409 of TSCA, 15 U.S.C. §§ 2615(a) and 2689, Complainant filed a nine (9) count Administrative Complaint and Notice of Opportunity for a Hearing against Respondent in accordance with the *Consolidated Rules of Practice*. The Complaint alleged violations by the Respondent of Section 409 of TSCA, 15 U.S.C. § 2689, and 40 C.F.R. Part 745, Subpart E, in connection with lead-based paint renovations performed at four (4) residential properties located in Philadelphia and Narberth, Pennsylvania.

4. 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.
5. 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.
6. Pursuant to 40 C.F.R. § 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).
7. Pursuant to Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103, the term "target housing" means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than six (6) years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.
8. At all times relevant to this proceeding, Respondent was a "person", "firm" and "renovator" as those terms are defined by 40 C.F.R. § 745.83.

822 S. 5th Street, Philadelphia, Pennsylvania

9. At all times relevant to the Complaint, the building located at 822 S. 5th Street, in Philadelphia, Pennsylvania ("Fifth Street Residence") was a residential property built before 1978, not "housing used for the elderly" (as defined by 40 C.F.R. Section 745.103), not housing for persons with disabilities, and not a "0-bedroom dwelling (as defined by 40 C.F.R. Section 745.103).
10. At all times relevant to the Complaint, the Fifth Street Residence was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103.
11. In or about 2016, Respondent conducted and supervised work that included the disturbance of approximately 1,000 square feet of painted surfaces in the Fifth Street Residence.
12. The work that Respondent conducted and supervised at the Fifth Street Residence was a "renovation" as defined by 40 C.F.R. § 745.83, and a "renovation performed for compensation at target housing" as defined by 40 C.F.R. § 745.82.
13. At the time of the violations alleged in the Complaint, the painted components affected by the renovation of the Fifth Street Residence were not determined to be free of lead-based paint by any of the methods described in 40 C.F.R. § 745.82(a).

14. The renovation of the Fifth Street Residence was not an emergency renovation as described in 40 C.F.R. § 745.82(b).

815 N. Woodbine Ave, Narberth, Pennsylvania

15. At all times relevant to the Complaint, the building located at 815 N. Woodbine Ave., in Narberth, Pennsylvania ("Woodbine Residence") was a residential property built before 1978, not "housing used for the elderly" (as defined by 40 C.F.R. Section 745.103), not housing for persons with disabilities, and not a "0-bedroom dwelling (as defined by 40 C.F.R. Section 745.103).
16. At all times relevant to the Complaint, the Woodbine Residence was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103.
17. In or about 2016, Respondent conducted and supervised work that included the disturbance of approximately 500 square feet of painted surfaces in the Woodbine Residence.
18. The work that Respondent conducted and supervised at the Woodbine Residence was a "renovation" as defined by 40 C.F.R. § 745.83 and a "renovation performed for compensation at target housing" as defined by 40 C.F.R. § 745.82.
19. At the time of the violations alleged in the Complaint, the painted components affected by the renovation of the Woodbine Residence were not determined to be free of lead-based paint by any of the methods described in 40 C.F.R. § 745.82(a).
20. The renovation of the Woodbine Residence was not an emergency renovation as described in 40 C.F.R. § 745.82(b).

1602 Bainbridge Street, Philadelphia, Pennsylvania

21. At all times relevant to the Complaint, the building located at 1602 Bainbridge Street in Philadelphia, Pennsylvania ("Bainbridge Residence") was a residential property built before 1978, not "housing used for the elderly" (as defined by 40 C.F.R. Section 745.103), not housing for persons with disabilities, and not a "0-bedroom dwelling (as defined by 40 C.F.R. Section 745.103).
22. At all times relevant to the Complaint, the Bainbridge Residence was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103.
23. In or about 2016, Respondent conducted and supervised work that included the disturbance of approximately 350 square feet of painted surfaces in the Bainbridge Residence.

24. The work that Respondent conducted and supervised at the Bainbridge Residence was a "renovation" as defined by 40 C.F.R. § 745.83 and a "renovation performed for compensation at target housing" as defined by 40 C.F.R. § 745.82.
25. At the time of the violations alleged in the Complaint, the painted components affected by the renovation of the Bainbridge Residence were not determined to be free of lead-based paint by any of the methods described in 40 C.F.R. § 745.82(a).
26. The renovation of the Bainbridge Residence was not an emergency renovation as described in 40 C.F.R. § 745.82(b).

2023-25 Rittenhouse Square, Philadelphia, Pennsylvania

27. At all times relevant to the Complaint, the building located at 2023-25 Rittenhouse Square in Philadelphia, Pennsylvania ("Rittenhouse Residence") was a residential property built before 1978, not "housing used for the elderly" (as defined by 40 C.F.R. Section 745.103), not housing for persons with disabilities, and not a "0-bedroom dwelling (as defined by 40 C.F.R. Section 745.103).
28. At all times relevant to the Complaint, the Rittenhouse Residence was "target housing" as defined by Section 401(17) of TSCA, 15 U.S.C. § 2681(17), and 40 C.F.R. § 745.103.
29. In or about 2015, Respondent conducted and supervised work that included the disturbance of approximately 143 square feet of painted surfaces on the first floor and 88 square feet of painted surfaces on the second floor of the Rittenhouse Residence.
30. The work that Respondent conducted and supervised at the Rittenhouse Residence was a "renovation" as defined by 40 C.F.R. § 745.83 and a "renovation performed for compensation at target housing" as defined by 40 C.F.R. § 745.82.
31. At the time of the violations alleged in the Complaint, the painted components affected by the renovation of the Rittenhouse Residence were not determined to be free of lead-based paint by any of the methods described in 40 C.F.R. § 745.82(a).
32. The renovation of the Rittenhouse Residence was not an emergency renovation as described in 40 C.F.R. § 745.82(b).

Count 1 – Failure to Obtain Initial Firm Certification

33. The preceding paragraphs are incorporated herein as if fully set forth at length.

34. Pursuant to 40 C.F.R. § 745.81(a)(2)(ii), prior to performing renovations in target housing for compensation, firms are required to obtain an initial certification from EPA in accordance with 40 C.F.R. § 745.89.
35. Respondent was not certified by EPA and was not exempted from such certification as provided by 40 C.F.R. § 745.89, prior to the dates of the renovations at the: Fifth Street Residence; Woodbine Residence; Bainbridge Residence; and Rittenhouse Residence.
36. Respondent's failure to obtain an initial certification from EPA prior to or at the time of the renovations at the: Fifth Street Residence in 2016; the Woodbine Residence in 2016; the Bainbridge Residence in 2016; and the Rittenhouse Residence in 2015, constitutes a violation of 40 C.F.R. § 745.81(a)(2)(ii) and Sections 16 and 409 of TSCA, 15 U.S.C. §§ 2615 and 2689.

Counts 2-5 – Failure to Document Compliance with Information Distribution Requirement

37. The preceding paragraphs are incorporated herein as if fully set forth at length.
38. Pursuant to 40 C.F.R. § 745.84(a)(1), firms are required to provide EPA's *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers* pamphlet to owners of target housing, and obtain either a written acknowledgement of receipt from the owner or a certificate of mailing before beginning renovation activities.
39. Respondent failed to obtain either a written acknowledgment of receipt from the owners of or a certificate of mailing of the lead hazard information pamphlet prior to the renovation activities beginning at the: Fifth Street Residence in 2016; Woodbine Residence in 2016; Bainbridge Residence in 2016; and Rittenhouse Residence in 2015.
40. Respondent's acts or omissions as described in Paragraph 39, above, constitute four (4) violations of 40 C.F.R. § 745.84(a)(1) and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689.

Counts 6-9 – Failure to Retain Records Demonstrating Compliance with Work Practices

41. The preceding paragraphs are incorporated herein as if fully set forth at length.
42. Pursuant to 40 C.F.R. § 745.86(a), firms performing renovations are required to retain and, if requested, make available to EPA all records necessary to demonstrate compliance with the Residential Property Renovation regulations promulgated at 40 C.F.R. Part 745, Subpart E, for a period of 3 years following completion of the renovation.
43. 40 C.F.R. § 745.86(b) specifies the types of records required to be retained pursuant to 40 C.F.R. § 745.86(a) and includes, but is not limited to, records documenting compliance with the work

practice standards of 40 C.F.R. § 745.85(a) and post renovation cleaning verification requirements of 40 C.F.R. § 745.85(b).

44. Respondent failed to retain records documenting compliance with the Residential Property Renovation regulations promulgated at 40 C.F.R. Part 745, Subpart E, including records documenting compliance with the work practice standards of 40 C.F.R. § 745.85(a) or post-renovation cleaning verification requirements of 40 C.F.R. § 745.85(b), as required by 40 C.F.R. 745.86(b)(6), for the renovations performed at the: Fifth Street Residence in 2016, Woodbine Residence in 2016; Bainbridge Residence in 2016; and Rittenhouse Residence in 2015.
45. Respondent's acts or omissions as described in Paragraph 44, above, constitute four (4) violations of 40 C.F.R. § 745.86(a) and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689.
46. Based upon the foregoing, I hold 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 I through IX of the Complaint, and that Respondent's violations provide the legal basis for the assessment against Respondent of a civil penalty pursuant to Section 16(a) of TSCA, 15 U.S.C. § 2615(a).
47. I find that, on April 8, 2019, the Complaint was lawfully and properly served on the Respondent at Respondent's corporate offices via certified mail, return receipt requested, in accordance with 40 C.F.R. § 22.5(b)(1)(i) and (ii)(A).
48. As of the date of this Default Order, Respondent has not filed with EPA Region 3's Regional Hearing Clerk an Answer to the Complaint or made a request for an extension of time to file an Answer.
49. On September 17, 2019, Complainant filed a Motion for Default requesting the issuance of an Order finding the Respondent in default for failure to file an Answer to the Complaint and assessing a civil penalty in the amount of $9,573.00.
50. As of the date of this Default Order, Respondent has failed to respond to the Complainant's Motion for Default Order, and such failure is deemed to be a waiver of any objection to the granting of Complainant's Motion. 40 C.F.R. § 22.16(b).
51. Based upon a review of the factual record and procedural history of this matter, I find that Respondent is in default for failure to file an Answer to the Complaint and that no "good cause" or basis exists as to why a default order should not be issued against Respondent.

IV. Determination of Civil Penalty Amount

Section 16(a)(1) of TSCA, 15 U.S.C. § 2615(a)(1), provides that any person who violates Section 15 or 409 of TSCA, 15 U.S.C. §§ 2614 or 2689, shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 per day per violation. This statutory penalty amount was adjusted pursuant to the Federal Civil Penalties Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Inflation Adjustment Act Improvement Act of 2015. EPA's annual penalty adjustments are set forth in the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19. Pursuant to this rule, violations of TSCA Section 16(a)(1), 15 U.S.C. § 2615(a)(1), that occurred on or before November 2, 2015 are subject to a civil penalty not to exceed $37,500 per day per violation, and violations that occur after November 2, 2015, where penalties are assessed on or after January 15, 2019, are subject to a civil penalty not to exceed $39,873 per day per violation. (See 84 Fed. Reg. 2056 (February 6, 2019)). For purposes of determining the amount of a civil penalty to be assessed for violations of TSCA, TSCA Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires EPA to take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require ("statutory factors").

The EPA Environmental Appeals Board (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 TSCA statutory factors. 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, the EPA "must show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors." Id. 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, 133 (EAB 2000)).

For purposes of calculating penalties for cases involving violations of TSCA's Lead Renovation, Repair and Painting Rule, EPA issued the "*Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule*" ("*ERPP*") (August 2010 and revised April 2013). The *ERPP* sets forth EPA's analysis of the TSCA statutory factors as they apply to particular cases. (*ERPP* at 8). Under the *ERPP*, there are two components of a penalty calculation: (1) determination of a gravity-based penalty based on the nature[4], circumstances[5], extent[6], 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.

A. Complainant's Penalty Calculation

In the Complaint, Complainant proposed the assessment of a civil penalty in the amount of $27,879.00. On July 10, 2019, after the filing of the Complaint, the Complainant received additional information from the Respondent and, based upon this new information, revised the penalty calculation to $9,573.00. More specifically, Complainant was provided with information by the Respondent indicating that no individuals younger than 18 years of age resided in any of the target housing at issue in this case during the time period of the violations alleged in the Complaint. (Motion for Default at 8 and n.1, and Exhibit H.)

In support of its Motion for Default, Complainant has provided the Declaration of Craig Yussen, a chemical engineer, credentialed inspector and compliance officer with U.S. EPA Region 3's Enforcement and Compliance Assurance Division. (Yussen Declaration at ¶ 1).[7] In his declaration, Mr.

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[4] The nature, or essential character, of a violation is characterized under the ERPP as being either: chemical control, control-associated data gathering, or hazard assessment. *ERPP* at 14.

[5] The circumstance level reflects the probability that an owner or occupant of target housing will suffer harm based on a particular violation. Under the ERPP circumstance levels range from a 1 to 6, with a level 1 or 2 having the highest probability of harm, levels 3 or 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.*

[6] The extent 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.* Violations are characterized as being either: major, significant or minor. *ERPP at 16-17.*

[7] Annie Hoyt, a Region 3 compliance officer, was the original case development officer and performed the penalty calculation for this matter. Yussen Declaration at ¶ 4. Ms. Hoyt is, as of the date of this Motion, on extended leave and unavailable. Id. at ¶ 2. In preparing his declaration, Mr. Yussen "reviewed the investigative file for this matter including the penalty calculation worksheet prepared by Annie Hoyt in support of Complainant's September 17, 2019 Motion for Default ("Default Motion")" in order to familiarize himself with the facts of the case and the relevant penalty calculation. Id. at ¶ 4.

Yussen represents that the proposed civil penalty was calculated in consideration of the TSCA statutory factors by utilizing the penalty calculation methodology set forth in the *ERPP*. (Yussen Declaration at ¶ 5). Utilizing the *ERPP*, Complainant calculated the proposed penalty of $9,573.00 as follows:

Count I – Failure to Obtain Initial Certification from EPA

Nature – Chemical Control
Circumstance - Level 3a
Extent – Minor (No resident individual younger than 18)
GBP Penalty Matrix = $4,500.00
Post 11/2/2015 Inflation Multiplier (2018 Inflation Adjustment Rule, Table A, p.13) – 1.03711
Count I Penalty – $4,667.00

Counts II-V – Failure to Document Compliance with Information Distribution Requirement

Nature – Hazard Assessment
Circumstance - Level 4b
Extent – Minor (No resident individual younger than 18)
GBP Penalty Matrix = $580.00
Post 11/2/2015 Inflation Multiplier (2018 Inflation Adjustment Rule, Table A, p.13) – 1.03711
Fifth Street Residence - $601.00
Woodbine Residence - $601.00
Bainbridge Residence - $601.00
On or before 11/2/2015 Inflation Multiplier (2013 Inflation Adjustment Rule, p.6) – 1.0487
Rittenhouse Square Residence - $608.00
Counts II-V Total Penalty – $2,411.00

Counts VI-IX – Failure to Retain Records Demonstrating Compliance with Work Practices

Nature – Chemical Control
Circumstance - Level 6a
Extent – Minor (No resident individual younger than 18)
GBP Penalty Matrix = $600.00
Post 11/2/2015 Inflation Multiplier (2018 Inflation Adjustment Rule, Table A, p.13) – 1.03711
Fifth Street Residence - $622.00
Woodbine Residence - $622.00
Bainbridge Residence - $622.00
On or before 11/2/2015 Inflation Multiplier (2013 Inflation Adjustment Rule, p.6) – 1.0487
Rittenhouse Square Residence - $629.00
Counts VI-IX Total Penalty – $2,495.00

Total Civil Penalty - $9,573.00

(Yussen Declaration at ¶¶ 11-13; and Motion for Default – Exhibit I). Based upon available information, Complainant determined that upward or downward adjustments to the penalty calculation were not warranted with respect to Respondent's: ability to pay the penalty; effect of the penalty on Respondent's ability to continue to do business; culpability; history of prior violations; or such other factors as justice may require. (Motion for Default at 10 and Yussen Declaration at ¶ 14.) With regard to Respondent's ability to pay, Complainant has indicated that it possesses "no current information to support a belief that Respondent cannot pay the full penalty" proposed by Complainant, and that Respondent has not raised an inability-to-pay claim. (Motion for Default at 7 and Yussen Declaration at ¶ 15).

B. Analysis of Penalty Calculation

Based upon my review of the record of this case, the TSCA statutory factors and the *ERPP*, I find that the proposed civil penalty of $9,573.00 is appropriate in light of Respondent's violations and is not clearly inconsistent with the record of this proceeding or with 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.

I find that Complainant correctly calculated its proposed civil penalty in accordance with the *ERPP*. Additionally, for the reasons set forth below, I find that the *ERPP* provides a rational, consistent and equitable methodology for applying the TSCA statutory factors to the facts and circumstances of this case.

Count I – Failure to Obtain Initial Certification from EPA

Nature of Violation - With regard to Respondent's violation of 40 C.F.R § 745.81(a)(2)(ii), failing to obtain an initial certification from EPA, I conclude that it is appropriate to characterize this requirement as "Chemical Control" in nature in that an initial certification is aimed at limiting exposure to and the risk presented by lead-based paint by ensuring that only certified firms perform renovations utilizing appropriate work practices. Lead poisoning in children has been determined to present numerous deleterious health consequences including, "intelligent quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavior problems,"

and, in severe cases may lead to seizures, coma and death. *ERPP* at 14.[8] Lead in residential housing and child-occupied facilities remains the most important source of lead exposure for young children and pregnant women. Id. In order to address the problem of exposure to lead sources, like lead-based paint, EPA promulgated the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule to form a comprehensive lead-based paint regulatory program. *ERPP* at 15. The purpose of the RRP Rule was to set forth requirements providing work-practice standards "to limit exposures to lead during renovation and abatements and the cleanup procedures to reduce exposures to lead following renovations and abatements." Id.

Circumstance Level – The record of this matter supports a finding that Respondent's failure to obtain an initial certification from EPA resulted in a medium probability of harm or impact to human health and the environment. Requiring renovation firms to obtain an initial certification is a central component of EPA's regulatory program in that it ensures that companies performing renovations have the necessary skills, training and knowledge of work-practice requirements to minimize the risk of exposure to lead.

Extent of Violation – Due to the fact that, at the time of the renovations of the four properties at issue in this matter, no individuals under the age of eighteen resided in or were present in the premises, I conclude that Respondent's violation of 40 C.F.R § 745.81(a)(2)(ii) posed a low potential for harm (*ERPP* at 16) and warrants an extent level of minor.

GBP Penalty for Count I – Based upon the aforesaid analysis, I conclude that a gravity-based penalty in the amount of $4,500.00 is appropriate for Respondent's violation of 40 C.F.R. § 745.81(a)(2)(ii). Additionally, I find that an inflation factor of 1.03711 is appropriate for this violation, under the 2018 Inflation Adjustment Rule. This results in a total civil penalty for Count I of $4,667.00.

Counts II to V – Failure to Document Compliance with Information Distribution Requirements

Nature of Violation - With regard to Respondent's failure to obtain a written acknowledgement of providing EPA's Lead Pamphlet or written certification of mailing of the Pamphlet pursuant to 40 C.F.R. § 745.84(a)(1), I conclude that it is appropriate to characterize this requirement as "Hazard

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[8] *See also* Lead-Clearance and Clearance Testing Requirements for the Renovation, Repair and Painting Program, 75 Fed. Reg. 25,038, 25,039-41 (May 6, 2010); Lead – Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,693-4 (April 22, 2008); and Lead – Renovation, Repair, and Painting Program, 71 Fed. Reg. 1588, 1590 (Jan. 10, 2006).

Assessment" in nature in that distribution of the EPA Pamphlet is directly intended to provide owners and occupants of target housing, among others, with information that will allow them to assess the risks presented by renovations and to take proper precautions to avoid exposure and hazards.

Circumstance Level – The record of this matter supports a finding that Respondent's failure to distribute the EPA Pamphlet prior to performing the aforementioned renovations resulted in a medium probability of harm or impact to human health and the environment. The EPA Pamphlet "contains information on the health effects of lead, how exposure can occur, and steps that can be taken to reduce or eliminate the risk of exposure during various activities in the home." 71 F.R. 1588, 1592-93. As a result, the EPA Pamphlet allows those seeking out renovation services to make educated decisions about whether to undertake the renovation activities in their residences and to adequately evaluate the risks such activities may pose to the health well-being of the residence's occupants, especially young children and pregnant women.

Extent of Violation – As previously discussed, at the time of the renovations of the four properties at issue in this matter, no individuals under the age of eighteen resided in or were present in the premises. Therefore, I conclude that Respondent's violations posed a low potential for harm and warrant an extent level of minor.

GBP Penalty for Counts II to V – Based upon the aforesaid analysis, I conclude that a gravity-based penalty in the amount of $580.00 is appropriate for each of Respondent's violations of 40 C.F.R. § 745.84(a)(1). Additionally, I find that, under the 2018 Inflation Adjustment Rule, an inflation factor of 1.03711 is appropriate for Respondent's violations at the Fifth Street, Woodbine and Bainbridge Residences, resulting in a civil penalty of $601.00 for each of these violations. I find that, under the 2013 Inflation Adjustment Rule, an inflation factor of 1.0487 is appropriate for Respondent's violation at the Rittenhouse Square Residence, resulting in a civil penalty of $608.00 for this violation. This results in a total civil penalty for Counts II to V of $2,411.00.

Counts VI to IX- Failure to Retain Records Demonstrating Compliance with Work Practices

Nature of Violation - With regard to Respondent's violations of 40 C.F.R. § 745.86(a), failure to retain renovation-related records for a period of three years following completion of a renovation, I conclude that it is appropriate to characterize this requirement as "Chemical Control" in nature in that maintenance of such records is intended, among other things, to enable regulators, like EPA, to

determine if appropriate work-practice standards were undertaken in connection with lead-based paint renovation activities.

Circumstance Level – The record of this matter supports a finding that Respondent's failure to maintain renovation records posed a low probability of harm or impact to human health and the environment. Although important to the EPA regulatory program concerning the control of lead hazards, the maintenance of such records is intended to serve more as a control and compliance mechanism for the regulatory program, as opposed to a work practice to limit the creation of lead hazards in the field.

Extent of Violation – As previously discussed, at the time of the renovations of the four properties at issue in this matter, no individuals under the age of eighteen resided in or were present in the premises. Therefore, I conclude that Respondent's violations posed a low potential for harm and warrant an extent level of minor.

GBP Penalty for Counts VI to IX – Based upon the aforesaid analysis, I conclude that a gravity-based penalty in the amount of $600.00 is appropriate for each of Respondent's violations of 40 C.F.R. § 745.86(a). Additionally, I find that, under the 2018 Inflation Adjustment Rule, an inflation factor of 1.03711 is appropriate for Respondent's violations at the Fifth Street, Woodbine and Bainbridge Residences, resulting in a civil penalty of $622.00 for each of these violations. I find that, under the 2013 Inflation Adjustment Rule, an inflation factor of 1.0487 is appropriate for Respondent's violation at the Rittenhouse Square Residence, resulting in a civil penalty of $629.00 for this violation. This results in a total civil penalty for Count VI to IX of $2,495.00.

The total Gravity-Based Penalty for Counts I through IX is $9,573.00.

I also find that Complainant adequately considered the TSCA statutory factors in calculating the proposed civil penalty for the violations alleged in the Complaint. Complainant has represented that it possesses no information to warrant an upward or downward adjustment to the proposed civil penalty in light of Respondent's: culpability; history of prior violations; or other matters as justice may require. I also find no evidence in the record of this matter to warrant any adjustment for these factors.

With respect to Respondent's ability-to-pay the proposed penalty and ability to continue to do business, I find that an adjustment to the gravity-based penalty component is not warranted. The Complainant has represented that it possesses no information that warrants either an upward or downward adjustment to the gravity-based penalty with respect to Respondent's ability to pay or effect

on Respondent's ability to continue to do business. The EAB has held that "'a respondent's ability to pay may be presumed until it is put at issue by a respondent,' because the Agency's ability to gather the necessary financial information about a respondent is limited and the respondent is in the best position to obtain the relevant financial records about its own financial condition." *In re: CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003) (*citing Spitzer Great Lakes,* 9 E.A.D. at 321 and *New Waterbury*, 5 E.A.D. at 541.) *See also In re: Donald Cutler*, 11 E.A.D. 622, 632 (EAB 2004); and *In re Kay Dee Veterinary*, 2 E.A.D. 646, 652 n.15 (CJO 1988) (referring to the "customary evidentiary rule that the party to an adjudicatory proceeding who is in possession of the facts has the responsibility to produce them.") In those instances when "a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived." *Spitzer Great Lakes,* 9 E.A.D. at 321 (*citing New Waterbury*, 5 E.A.D. at 542). In the matter at bar, Respondent has not raised an ability to pay claim.

Therefore, based upon the aforesaid analysis, I conclude that Complainant correctly calculated the civil penalty proposed in this matter based upon the TSCA statutory factors and in accordance with the *ERPP*. Further, I hold that the proposed penalty of $9,573.00 is appropriate in light of Respondent's violations of TSCA and is not clearly inconsistent with the record of this proceeding, TSCA, the Residential Lead-Based Paint Hazard Reduction Act, or the RRP Rule.

ORDER

Pursuant to the *Consolidated Rules of Practice*, 40 C.F.R. §§ 22.17 and .27, Complainant's Motion for Default is **GRANTED** and Respondent is **ORDERED** as follows:

1. Respondent, Bottos Construction, Inc. is assessed a civil penalty in the amount of $9,573.00 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 means 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 mailed to:

      United States Environmental Protection Agency
      Cincinnati Finance Center
      Government Lockbox 979077
      1005 Convention Plaza
      Mail Station SL-MO-C2-GL
      St. Louis, MO 63101
      Contact: 314-425-1818

   c. All payments made by check in any currency drawn on banks with no USA branches shall be addressed for delivery to:

      United States Environmental Protection Agency
      Cincinnati Finance Center
      MS-NWD
      26 W. M.L. King Drive
      Cincinnati, OH 45268-0001

d. 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"

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

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 – Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737
Contact: 866-234-5681

f. On-Line Payment Option: WWW.PAY.GOV/paygov/

Enter "sfo 1.1" in the search field. Open and complete the form.

g. Additional payment guidance is available at:

https://www2.epa.gov/financial/makepayment

3. At the time that 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
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

Jennifer Abramson
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029

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4. In the event that Respondent fails to pay the civil penalty as directed above, this matter may be referred to a United States Attorney's Office for further action.
5. 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.
6. 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).
7. Under 40 C.F.R. § 22.30, 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.

March 3, 2020
Date

Joseph J. Lisa
Regional Judicial and Presiding Officer
U.S. EPA Region III

CERTIFICATE OF SERVICE

This Initial Decision and Default Order (U.S. EPA Docket No. TSCA-03-2019-0058) was served on MAR 3 2020 by the manner indicated below upon the following:

COMPLAINANT:

Via Hand Delivery

Jennifer Abramson
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Mail Code (3RC30)
Philadelphia, PA 19103-2029

RESPONDENT:

Via Certified Mail/Return Receipt Requested

Certified Mail No. 7016 0910 0000 4068 5753

Constantinos Bottos
Dino Bottos
Bottos Construction, Inc.
1005 Sussex Boulevard
Broomall, PA 19008

Via Certified Mail/Return Receipt Requested

Certified Mail No. 7016 0910 0000 4068 5722

Robert S. Clewell
Clewell Law Firm
1617 JFK Boulevard
Philadelphia, PA 19103

ENVIRONMENTAL APPEALS BOARD:

Via Email (Durr.Eurika@epa.gov)

Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Kevin Esposito

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III (3RC00)