THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Robert Lauter d/b/a Prime Cut Paint	)	**Docket No. TSCA-03-2023-0034**
	)	
Respondent.	)	

INITIAL DECISION AND ORDER ON PENALTY

I. ABBREVIATED PROCEDURAL HISTORY

This civil penalty proceeding arises from an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") filed on December 7, 2022, by the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency ("EPA" or "Agency"), Region 3 ("Complainant"), alleging that Robert Lauter d/b/a Prime Cut Paint ("Respondent") violated Sections 15 and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C §§ 2614 and 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart E (known as the Lead-Based Paint Renovation, Repair, and Painting Rule or "RRP Rule"), in relation to activities performed at four separate properties in the Commonwealth of Virginia. Specifically, the Complaint charged Respondent with 15 counts of violation and proposed a total civil monetary penalty of $117,250 in regard thereto.

On January 5, 2023, Respondent, appearing *pro se*, filed a response to the Complaint, and the Regional Hearing Clerk subsequently forwarded the matter to this Tribunal for adjudication. Pursuant to an Order of this Tribunal, on February 23, 2023, Respondent then filed an Answer to the Complaint.

A Prehearing Order establishing prehearing procedures and deadlines, including deadlines for the parties to engage in a settlement conference and to participate in a prehearing exchange of information, was issued on January 19, 2023. Respondent declined to participate in a settlement conference or file a prehearing exchange as directed by the Prehearing Order, however. On April 20, 2023, an Order to Respondent to Show Cause was issued, advising Respondent that under Section 22.17(a) of the applicable procedural rules (named the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules") and codified at 40 C.F.R. Part 22), a party may be found to be in default upon failure to comply with the requirement to exchange information pursuant to Section 22.19(a) or an order of the presiding Administrative Law Judge, and that default by a respondent constitutes an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest those allegations.

Respondent did not file any response to the Order to Respondent to Show Cause. Thereafter, on November 28, 2023, a Default Order was issued pursuant to 40 C.F.R. § 22.17,[1] and it is incorporated by reference herein. In that Order, after considering the procedural violation committed by Respondent, the reason for his failure to comply, and whether he had raised any defenses shown in the record to have a strong probability of success if a hearing were held, I found Respondent to be in default, such that he was deemed to have admitted the truth of the facts alleged in the Complaint. Default Order at 5. Nevertheless, I determined that the facts as alleged in the Complaint failed to establish liability for three of the four properties identified in the Complaint. Default Order at 10-11. As to the fourth property, identified therein as the "Broad Street Property," based upon the facts as alleged in the Complaint, Respondent was found liable for the following six alleged violations:

> (1) Failing to have a firm certification from EPA under 40 C.F.R. § 745.89(a) prior to and while performing the renovation for compensation, in violation of 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89 and Section 409 of TSCA, 15 U.S.C. § 2689;
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> (2) Failing to have a certified renovator assigned to the renovation performed at the Broad Street Property as required by 40 C.F.R. § 745.89(d)(2), in violation of that provision and Section 409 of TSCA, 15 U.S.C. § 2689;
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> (3) Failing to distribute to the owners of the Broad Street Property a copy of EPA's Renovate Right pamphlet and failing to obtain a written acknowledgement of receipt from the owners or maintain a certificate of mailing at least seven days prior to undertaking the renovation at the property as required by 40 C.F.R. § 745.84(a), in violation of 40 C.F.R. § 745.84(a)(1) and Section 409 of TSCA, 15 U.S.C. § 2689;
>
> (4) Failing to make available to EPA all records necessary to demonstrate that the renovator performed all relevant lead-safe work practices described in 40 C.F.R. § 745.85(a) and that the renovator performed the post-renovation cleaning described in 40 C.F.R. § 745.85(b) at the Broad Street Property, in violation of 40 C.F.R. § 745.86(b)(6) and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689;
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> (5) Failing to post signs at the Broad Street Property on or around September 4, 2019, clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside the work area, in violation of 40 C.F.R. §§ 745.85(a)(1) and 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689; and
> (6) Failing to cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of the surfaces undergoing renovation at the Broad Street Property, in violation of 40 C.F.R. §§ 745.85(a)(2)(ii)(C) and 745.89(d)(3) and Section 409 of TSCA, 15 U.S.C. § 2689.

[1] Copies of the Default Order were served on Respondent at his email address of record and at his mailing address of record by both regular and certified mail. The copies sent by email and regular mail were not returned to this Tribunal as undeliverable. The copy sent by certified mail was returned as unclaimed by Respondent and received by this Tribunal on February 20, 2024.

Default Order at 12-14.

Lastly, the Default Order addressed the issue of penalty assessment. Default Order at 14-18. As detailed in its Initial Prehearing Exchange ("Complainant's Initial PHE"), filed on March 16, 2023, Complainant proposed a civil monetary penalty in the aggregate amount of $68,288 for the six violations found to have occurred at the Broad Street Property. Default Order at 14 (citing Complainant's proposed exhibit ("CX") 61).[2] According to Complainant, its proposed penalties took into consideration the statutory penalty factors set forth in TSCA, 15 U.S.C. § 2615(a)(2)(B), along with the following three guidance documents: (1) EPA's "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule," dated August 2010 and last revised on April 5, 2013 ("RRP ERPP") (CX 63); (2) EPA's January 11, 2018 memorandum addressing amendments to EPA's civil penalty policies to account for inflation in the calculation of penalties ("2018 Penalty Policy Inflation Memo") (CX 64); and (3) EPA's June 29, 2015 memorandum providing guidance on evaluating a violator's ability to pay a civil penalty in an administrative enforcement action ("ATP Guidance") (CX 65). Default Order at 14-15 (citing Compl. ¶¶ 74-75; Complainant's Initial PHE at 21).

Specifically, Complainant proposed the follow inflation-adjusted penalties for the six Broad Street Property violations found, noting the circumstance level and extent category for each as Complainant determined them to be in accordance with the RRP ERPP:

Violation	Circumstance Level, Extent Category	Proposed Penalty
Renovating without firm certification	Circumstance Level 3a, Minor Extent	$4,667
Renovating without a certified renovator assigned to the renovation	Circumstance Level 3a, Significant Extent	$15,868
Failure to distribute to property owners a copy of EPA's Renovate Right pamphlet	Circumstance Level 1b, Significant Extent	$12,240
Failure to make available all records demonstrating the performance of all lead-safe work practices	Circumstance Level 6a, Significant Extent	$2,116
Failure to post signs clearly defining work area and warning persons not involved in the renovation to remain outside the work area	Circumstance Level 1b, Significant Extent	$12,240
Failure to cover ground with plastic sheeting or other impermeable	Circumstance Level 2a, Significant Extent	$21,157

[2] In its Initial Prehearing Exchange, Complainant identified and produced 72 documents as the exhibits it intended to introduce at hearing. On April 20, 2023, Complainant filed a "Rebuttal Prehearing Exchange," even though Respondent had not filed a prehearing exchange. In that second filing, Complainant identified and produced an additional proposed exhibit, CX 73, consisting of email correspondence from April 2023, in which Respondent emailed the Headquarters Hearing Clerk for this Tribunal and counsel for Complainant to state his intention of not participating in this proceeding.

material extending 10 feet beyond the perimeter of surfaces undergoing renovation		
	TOTAL	**$68,288**

Default Order at 16 (citing Complainant's Initial PHE at 22-23, 25-26).

Upon reviewing Complainant's penalty calculations, three specific deficiencies were observed constraining the assessment of the proposed penalty at that time, as provided for under the Rules of Practice. Default Order at 17 (citing 40 C.F.R. § 22.17(c) (providing that that upon default, the proposed relief "shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act")).

First, Complainant offered no clear explanation for why it characterized as "minor" the "extent" of Respondent's failure to have a firm certification from EPA prior to, and while performing, the renovation for compensation, as required by 40 C.F.R. § 745.89. Default Order at 17-18. The Default Order noted that according to the RRP ERPP, "significant" was the appropriate extent level to be applied to violations in cases where, as here, the target housing was occupied by a child between the ages of six and 18 years of age. Default Order at 17 (citing CX 63 at 19).

Second, the Tribunal could not replicate the mathematical calculations that led Complainant to seek penalty amounts of $12,240 for Respondent's failure to provide a copy of EPA's Renovate Right pamphlet to the owners of the Broad Street Property, as required by 40 C.F.R. § 745.84(a), as well as Respondent's failure to post signs clearly defining the work area and warning persons not involved in the renovation to remain outside of it, as required by 40 C.F.R. § 745.85(a)(1). Default Order at 18. According to the gravity-based penalty matrix appearing in Appendix B to the RRP ERPP, violations such as those with a circumstance level of "1b" and an extent category of "significant" correspond to a base penalty of $8,500. Default Order at 18 (citing CX 63 at 41). When that figure is multiplied by the applicable "inflation adjustment multiplier" of 1.03711 set forth in the 2018 Penalty Policy Inflation Memo, a sum of only $8,815 is reached for each of those violations. Default Order at 18 (citing CX 64).

Third, Complainant had not produced the affidavit, direct written testimony, or other documentation of the "Testimony of Craig Yussen," which it indicated it had relied upon, along with other documentation, to determine that Respondent was able to pay the proposed penalty. Default Order at 18 (citing Complainant's Initial PHE at 24).

Therefore, the Default Order instructed Complainant to respond to the deficiencies found regarding its penalty calculation on or before December 29, 2023.[3] Default Order at 19. On December 27, 2023, Complainant filed its Supplemental Brief responding to the Default Order, accompanied by three enclosures: EPA's Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy,

[3] The Default Order also advised Respondent that he "**may move for this Default Order to be set aside for good cause shown**." Default Order at 19 (emphasis in original) (citing 40 C.F.R. § 22.17(c)). To date, Respondent has not moved to set aside the Default Order or otherwise responded to the Default Order.

dated December 2007 (Enclosure A); a letter dated June 16, 2020, and addressed to Respondent, in which Complainant offered Respondent an opportunity to show cause for the alleged violations (Enclosure B); and the Declaration of Craig Yussen, dated December 22, 2023 (Enclosure C).

II. PENALTY CALCULATION

A. "Minor" Extent Classification of Violation of 40 C.F.R. § 745.89(d)(2) (Firm Certification)

In its Supplemental Brief, Complainant explains that it categorized as "minor" the extent of Respondent's violation for failing to have a firm certification from EPA as follows:

> While Complainant generally relied on Appendix B to the RRP ERPP to determine the Extent Category of each violation, it relied on Appendix A, footnote 49 to determine the Extent Category for the 40 C.F.R. § 745.81(a)(2)(ii) violation involving Respondent's failure to perform a renovation without the required firm certification. CX 63 at 32. This footnote provides that for self-employed renovators or very small firms (< 4 employees), the Extent Category is usually Minor and that for larger firms, such as those acting as general contractors, the Extent Category is usually Major, reflecting the potential impact resulting from the number and size of renovations. *Id.* As Respondent is self-employed and the only employee (*See* CX 3 at 3), Complainant determined the Extent Category to be Minor for this violation in accordance with the RRP ERPP.

Supp. Br. at 2 (citing Enc. C ¶¶ 26-29).

A review of Appendix A to the RRP ERPP indicates that footnote 49 is intended to provide ancillary information about a violation due to the "[f]ailure of a firm that performs, offers, or claims to perform renovations or dust sampling for compensation to obtain initial certification from EPA, under 40 C.F.R. § 745.89(a) pursuant to 40 C.F.R. § 745.81(a)(2)(ii)." CX 63 at 32. That footnote states in full:

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

CX 63 at 32 n.49 (emphasis added). In this case, the record shows that Respondent is self-employed, and so, to that extent, the footnote appears relevant. *See* Default Order at 9, ¶¶ 1-4. However, Respondent was not found to be simply "offering to perform" a renovation without an initial certification. *See* Default Order at 9-10. Rather, the facts alleged in the Complaint and deemed admitted by Respondent indicated that he *actually performed* renovation work at the Broad Street Property, which was occupied by an eight-year-old child at the time. Default Order at 9-10, ¶¶ 5, 7-11. Specifically, he pressure-washed, scraped, and sanded the exterior of the target property, all without

the requisite EPA certification. Default Order at 9-10, ¶¶ 5, 7, 9-11, 17. Therefore, it is, at best, uncertain whether the reduction in extent to a "minor" level, from a "significant" one, as suggested in Appendix A's footnote 49, was intended to apply under these circumstances. As noted in the RRP ERPP, the goal of penalty policies in general, and the ERPP in particular, is to "provide fair and equitable treatment of the regulated community, predictable enforcement responses, *and comparable penalty assessments for comparable violations*, with flexibility to allow for individual facts and circumstances of a particular case." CX 63 at 4 (emphasis added). Complainant's Supplemental Brief does not cite any case where this same type of violation (failure to obtain certification) was deemed "minor" in extent in a factual situation similar to that here, and the Tribunal has not found any such case. *Cf. Garcia*, 2019 WL 5290079, at *7 (EPA RJO July 18, 2019) (extent of violation of 40 C.F.R. § 745.89(a) found "minor" in connection with renovation conducted on target housing *not occupied by a child or pregnant person*; inflation adjusted penalty of $4,667 imposed); *GreenBuild Design & Constr., LLC*, 2022 WL 17736440, at *21 (EPA ALJ Dec. 12, 2022) (same) (noting that the "minor" extent of harm categorization is likely an "underestimation" due to debris left on bare ground with which children and pregnant persons could have come into contact).

Nevertheless, considering Respondent's default, this Tribunal feels constrained to increase the penalty imposed from the figure that Complainant previously notified Respondent it was seeking for this violation. Therefore, I accept Complainant's proposal that $4,667 is the appropriate penalty to be imposed for Respondent's violation arising from his failure to have a firm certification from EPA prior to and while performing the renovation for compensation at the Broad Street Property as required by 40 C.F.R. § 745.89(a), in violation of 40 C.F.R. §§ 745.81(a)(2)(ii) and 745.89 and Section 409 of TSCA, 15 U.S.C. § 2689.

B. Inflation-Adjusted Gravity-Based Penalty Calculation for Violations of 40 C.F.R. § 745.84(a) (Renovate Right Pamphlet) & 40 C.F.R. § 745.85(a)(1) (Post Signs)

As noted above, according to the RRP ERPP's gravity-based penalty matrices, Respondent's failure to comply with 40 C.F.R. § 745.84(a) (provide Renovate Right pamphlet) and 40 C.F.R. § 745.85(a)(1) (post signs), are both circumstance level 1b/significant extent category violations, which correspond to a gravity-based penalty of $8,500 per violation. CX 63 at 30, 41. Utilizing the "inflation adjustment multiplier" of 1.03711, as set forth in the 2018 Penalty Policy Inflation Memo provided by Complainant, yields a final penalty of $8,815 for each of these violations. CX 64 at 13. Therefore, the Default Order directed Complainant to explain how it calculated its proposed penalties of $12,240 for these violations. Default Order at 19.

In response, Complainant disclosed in its Supplemental Brief that while it used the RRP ERPP to determine that these violations were "level 1b/significant," it did not enter those values into the RRP ERPP's gravity-based penalty ("GBP") matrix to then determine the proposed penalty, as it had for the other violations in this case. Instead, it used the GBP matrix in EPA's "Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy," dated December 2007 ("Disclosure Rule ERPP"), a copy of which it attached to its Supplemental Brief as "Enclosure A" and which it noted is publicly available at https://www.epa.gov/sites/default/files/documents/1018erpp-1207.pdf. Supp. Br. at 3-4; Supp. Br. Enc. C ¶ 14. Complainant advised that the Disclosure Rule ERPP's GBP matrix identified $7,740 as the base penalty for "level 1/significant" violations. Supp. Br. at 4 (citing Enc. A at 34). Complainant stated

that it then applied the inflation multiplier of 1.58136 applicable to the Disclosure Rule ERPP in accordance with EPA's 2018 Penalty Policy Inflation Memo. Supp. Br. at 4 (citing CX 64 at 14; Supp. Br. Enc. C ¶¶ 31-33, 35-37); *see also* Supp. Br. Enc. C ¶ 24. This formula resulted in Complainant's proposed penalty of $12,240. Supp. Br. at 4; Supp. Br. Enc. C ¶¶ 33, 37.

While the foregoing explanation as to *how* Complainant calculated the proposed penalties for the two violations is pithy, clear, and mathematically correct, its explanation of *why* it chose to apply the Disclosure Rule ERPP, instead of the RRP ERPP, is anything but. *See* Supp. Br. at 2-4.

In its Supplemental Brief, Complainant begins its explanation of "why" by recalling that the "nature" of the violations is a factor to be considered in determining the penalty. Supp. Br. at 2 (citing CX 63 at 16-17). The requirements imposed by the RRP Rule are "chemical control" in nature, it notes, because those regulations control how renovators handle lead-based paint. Supp. Br. at 2 (citing CX 63 at 16-17). In contrast, Complainant asserts, "the requirements of the PRE Rule are best characterized as 'hazard assessment' in nature" because those regulations are designed to provide owners and occupants with information on lead-based paint hazards to afford them the opportunity to weigh the risks presented by renovations and take proper precautions to avoid the hazards.[4] Supp. Br. at 2 (citing CX 63 at 16-17). Complainant then notes that the RRP ERPP distinguishes between violations of the PRE Rule and the RRP Rule, both covered by the same ERPP, by designating PRE Rule violations as Circumstance Level "b," and RRP Rule violations as Circumstance Level "a." Supp. Br. at 2 (citing CX 63 at 30 n.48).

Next, Complainant advises that the Disclosure Rule ERPP was issued in 2007 in support of the "Disclosure Rule," the regulations that EPA promulgated in 1996 to implement Section 1018 of Title X - Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856 (enacted as Title X of the Housing and Community Development Act of 1992*)* ("RLBPHRA"). Supp. Br. at 3. The Disclosure Rule requires *sellers/lessors* of pre-1978 housing to disclose to buyers/lessees known lead-based paint and/or lead-based paint hazards. Supp. Br. at 3 (citing 40 C.F.R. Part 745, Subpart F). As enacted, the statutory maximum penalty for violations of the RLBPHRA or its implementing regulations was $10,000. Supp. Br. at 3 (citing 42 U.S.C. § 4852d(b)(5)).

In August 2010, EPA issued the RRP ERPP. Supp. Br. at 3. In the RRP ERPP, EPA consolidated into one enforcement response and penalty policy guidance as to violations arising under the "PRE Rule," the "RRP Rule," and the "Lead-Based Paint Activities, Certification, and Training Rule" ("LBP Activities Rule").[5] CX 63 at 4. The PRE Rule was promulgated in 1998 and, as previously noted, requires that compensated *renovators* of pre-1978 housing provide a lead hazard information pamphlet to the owners/occupants prior to commencing renovations. Supp. Br. at 3 (citing 40 C.F.R. Part 745, Subpart E). Ten years later in 2008, EPA promulgated the RRP Rule, which amended and re-codified the PRE

[4] The PRE Rule, or Pre-Renovation Education Rule, requires that compensated renovators of pre-1978 housing provide a lead hazard information pamphlet to the owners/occupants prior to commencing renovations. Supp. Br. at 3 (citing 40 C.F.R. Part 745, Subpart E).

[5] The LBP Activities Rule generally proscribes procedures and requirements for the training programs and certifications of those engaged in lead-based paint activities, and work practice standards for performing such activities. 40 C.F.R. Part 745, Subpart L.

Rule and prescribed, among other things, broad work practice standards for renovation, repair, and painting activities in target housing and child-occupied facilities. Supp. Br. at 3 (citing Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,758 (Apr. 22, 2008) (Final Rule)). The PRE Rule and RRP Rule, Complainant states, both implement Section 1021 of the RLBPHRA, which amended TSCA to add Title IV, entitled "Lead Exposure Reduction." Supp. Br. 3 (citing CX 63 at 5). As enacted, the statutory maximum penalty for violations of TSCA or its implementing regulations was $25,000. Supp. Br. at 3 (citing 15 U.S.C. § 2615(a)(1)).

The RLBPHRA and TSCA both require the use of the same statutory penalty factors – namely, those set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B) – to determine the appropriate amount of a civil penalty for violations, Complainant states. Supp. Br. at 3. In light thereof, and the fact that violations of the PRE Rule and the Disclosure Rule are both "hazard assessment" in "nature," EPA adopted the lower statutory maximum penalty of the RLBPHRA ($10,000) for PRE Rule violations when it issued the RRP ERPP, hence their unique identification as circumstance level "b" penalties therein. Supp. Br. at 3-4 & n.8 (citing Enc. C at 34).

Coming back to the penalty calculation methodology used here, Complainant states:

> *Consistent with this approach,* Complainant calculated penalties for the two significant extent circumstance/nature level 1b violations in question as if they were significant extent circumstance level 1 violations under the Disclosure Rule ERPP (*See* Enclosure A at 34) and made the appropriate adjustments for inflation in accordance with EPA's January 11, 2018 "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" policy.

Supp. Br. at 4 (emphasis added) (citing CX 64; Enc. C ¶¶ 31-33, 35-37). Complainant adds that "[t]his is the very same methodology that was applied and found to be appropriate in the matter of *Greenbuild Design & Construction, LLC*, EPA Docket No. TSCA-10-2021-0006 (December 12, 2022), Initial Decision. *See also* Build-It-Bros., L.L.C., EPA Docket No. TSCA-01-2019-0055) (December 29, 2020), Initial Decision and Default Order." Supp. Br. at 4.

Not completely grasping Complainant's impetus for jumping *to* the Disclosure Rule ERPP for calculating the penalties here simply because EPA incorporated the Disclosure Rule's lower penalties into the RRP ERPP for PRE Rule violations, I turned to the cases cited by Complainant for clarification.

In *GreenBuild*, the respondent renovator was found liable for four violations of the lead-based paint regulations in connection with work it undertook for compensation in July of 2018 at a vacant residential property. *GreenBuild*, 2022 WL 17736440, at *1-2. One of those violations was a failure to post warning signs as required by 40 C.F.R. § 745.85, in violation of 40 C.F.R. § 745.89(d)(3), as in the instant matter. *Id.* at *2. At hearing, the complainant offered the testimony of Maria "Socky" Tartaglia as to its calculation of its proposed penalty.[6] In regard to the violation for failing to post warning signs,

[6] At the time of the hearing, Ms. Tartaglia was a long-standing EPA employee then serving as an Environmental Protection

Ms. Tartaglia stated that she relied upon the RRP ERPP to characterize the circumstance of the violation to be "1b," as here, but the extent to be only "minor" because of the lack of exposure of children or pregnant persons. *Id.* at *13. Then, to determine the monetary penalty amount for that particular violation, as here, she eschewed the RRP ERPP and turned to the Disclosure Rule ERPP (referred to therein as "the Section 1018 ERP"). *Id.* Ms. Tartaglia testified that she did so in reliance upon a footnote in an EPA memorandum entitled "Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule," dated January 15, 2020 (referred to in *GreenBuild* as the "EPA Memo" and here as the "2020 Penalty Policy Inflation Memo").[7] *Id.*

That footnote states as follows:

> The 2010 "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" and the 2007 "Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy" both penalize violators who fail to provide and document receipt of certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for essentially the same type of deficiency, we have adopted the penalty matrix from the 2007 Section 1018 Disclosure Rule penalty policy in the Pre-Renovation Education Rule component of the 2010 Consolidated Lead-Based Paint penalty policy. Therefore, Level "a" penalties apply to violations of the Lead-Based Paint Renovation, Repair and Painting Rule and the Lead-Based Paint Activities (Abatement) Rule. *Level "b" penalties are derived from the current Section 1018 Lead-Based Paint Disclosure Rule matrix because the major activities of the Disclosure Rule and Pre-renovation Education Rule are very similar. Therefore, under this Policy, Level "b" penalties apply to violations of the Pre-Renovation Education Rule.*

2020 Penalty Policy Inflation Memo at 14 n.30 (emphasis added).

From the Disclosure Rule ERPP matrix, Ms. Tartaglia concluded that $2,580 was the appropriate gravity-based penalty for a circumstance level 1b/extent minor violation stemming from a failure to post warning signs and occurring after March 15, 2004. *GreenBuild*, 2022 WL 17736440, at *13. She then adjusted this figure by adding to it the sum of the inflation multiplier (1.64990) applicable to the Disclosure Rule ERPP as set forth in the 2020 Penalty Policy Inflation Memo. *Id.* at *13. This resulted in an inflation-adjusted gravity-based penalty of $4,257, a sum that the respondent in *GreenBuild* did not challenge at hearing and that the Tribunal accepted as correct in its Initial Decision. *Id.* at *22; *see Bollman Hat Co*., 8 E.A.D. 177, 189 (EAB 1999) ("Certainly, a presiding officer normally would be

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Specialist and TSCA Lead Based Paint Enforcement and Compliance Officer. *GreenBuild*, 2022 WL 17736440, at *8.

[7] The 2020 Penalty Policy Inflation Memo is publicly accessible at https://www.epa.gov/sites/default/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf.

justified in relying upon unrebutted testimony proffered by a Region concerning application of Agency policy to the facts of the particular case.").[8]

While Respondent's default in this case also results in the proposed penalties being unrebutted, for the reasons stated below, I decline to accept the penalty calculation methodology that Complainant used here (and in *GreenBuild)* and the resulting two proposed penalties of $12,240 for Respondent's violations of 40 C.F.R. § 745.84(a) (Renovate Right pamphlet) and 40 C.F.R. § 745.85(a)(1) (post signs).

First, I am not convinced as to the appropriateness of Complainant's reliance on footnote 30 from the 2020 Penalty Policy Inflation Memo as justification for utilizing the Disclosure Rule ERPP (and the inflation multiplier related thereto) for calculating the penalties for the two "hazard assessment" violations at issue here. Upon close review, that footnote appears to merely set out the rationale for EPA's policy decision to incorporate into the RRP ERPP the reduced penalties from the Disclosure Rule ERPP in relation to similar PRE Rule violations. Absent from the footnote is any language directing Agency personnel to utilize the Disclosure Rule ERPP for penalty calculations of PRE Rule violations, and such use seems inconsistent with PRE Rule violations being included in, and separately and specifically identified, as level "b" violations in the RRP ERPP, so as to match the penalty sums taken from the previously issued Disclosure Rule ERPP.

Moreover, I find no support in the RRP ERPP itself for the use of the Disclosure Rule ERPP for any of the violations it covers. The RRP ERPP indicates, without exception, that it applies to calculating penalties for violations of the "PRE, RRP and LBP Activities Rules," "promulgated under the authority of Title IV of TSCA," and that the Policy's appendices contain the "tables to be used in calculating civil penalties for the policy," including the Gravity-Based Matrices. CX 63 at 4, 5. In addition, in its own footnote, the RRP ERPP explicitly distinguishes the violations it covers from those addressed in the Disclosure Rule ERPP, stating that "[t]he § 1018 Disclosure Rule is addressed in a separate ERPP available at Appendix C at the TSCA Enforcement Policy and Guidance Documents." CX 63 at 4 & n.4. The RRP ERPP otherwise contains no mention of the Disclosure Rule or the Disclosure Rule ERPP. Significantly, the Disclosure Rule ERPP is not mentioned in the RRP ERPP under either the section describing the methodology for computing penalties or the "Special Circumstances/Extraordinary

[8] I also reviewed the Initial Decision and Default Order issued in *Build-It Bros., LLC*, Docket No. TSCA-01-2019-0055 (EPA RJO Dec. 29, 2020), https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/All%20Content%20-%20Web/02065DC19C3F02088525864F006E1F7B/$File/Initial%20Decision%20and%20Default%20Order%20Build%20it%20bros%20default%20final.pdf. In calculating the penalties in that case, the Regional Judicial Officer ("RJO") relied upon the RRP ERPP matrices to calculate the gravity-based penalties for the four lead-based paint violations found. *Id.* at 9-15. The RJO then used the RRP ERPP inflation adjustment factor of 1.03711 as set out in the 2018 Penalty Policy Inflation Memo for all of the violations except the failure to provide the EPA-approved pamphlet (Count II), which she distinguished as a "hazard assessment violation." *Id.* at 8, 9-10, 12-13. As to that violation, the RJO applied the Disclosure Rule "multiplication factor of 1.58136," but offered no discussion or authority for doing so. *Id.* at 10, 12-13 (citing 2018 Penalty Policy Inflation Memo at 14). In addition, the RJO in that case appears to have mistakenly granted the respondent a penalty reduction by relying upon the Agency's "Lead-based Paint Graduated Penalty Approach Policy for Small-Scale Businesses" ("Small Business Policy") (Appendix E to the RRP ERPP, which was attached to a memorandum dated September 20, 2019, and which is publicly accessible at https://www.epa.gov/sites/default/files/2019-10/documents/leadbasedpaintgraduatedpenaltyapproachpolicy092419.pdf). *See id.* at 10, 15. The Small Business Policy is applicable only in the case of negotiated settlements, not litigated cases. Small Business Policy at 1; *see Bollman*, 8 E.A.D. at 189-90 (holding that EPA cannot apply an EPA policy in the litigation context where the policy states that its application is limited to the settlement context). Based upon these factors, I do not find this decision to be instructive.

Adjustments" sections of the RRP ERPP where, should it apply, one would expect it to be mentioned. CX 63 at 10-11, 26.

On the other hand, the RRP ERPP repeatedly and specifically indicates that it is applicable to PRE Rule violations, while acknowledging that such violations "are best characterized as 'hazard assessment' in nature" and that "[t]he 'nature' of the violation will have a direct effect on the measure used to determine the appropriate 'circumstance' and 'extent' categories are selected on the GBP Matrix in Appendix B." CX 63 at 5, 16-17. In fact, it cites one of the violations at issue here, of a renovator failing to provide the requisite EPA pamphlet, as an example in its discussion of "extent," being one of the elements of the GBP Matrix in its Appendix B. CX 63 at 18. The renovator violations of the "hazard assessment" requirements set forth in Subpart E of Part 745 (the PRE Rule) at issue here – 40 C.F.R. § 745.84(a) (Renovate Right pamphlet) and 40 C.F.R. § 745.85(a)(1) (post signs) – are explicitly listed (as Level 1b) among the covered violations in the RRP ERPP's Appendix A, Section I. CX 63 at 30. Appendix B, labelled as the "Gravity-Based Penalty Matrix for the PRE, RRP, and LBP Activities Rules," excludes only from its coverage, via a footnote, "violations for training providers," as to which it cites an alternative matrix. CX 63 at 40 n.49 (citing CX 63 at 42). The GBP Matrix makes no reference to the Disclosure Rule or the Disclosure Rule ERPP applying to any violation of the PRE, RRP, and LBP Activities Rules. *See* CX 63 at 40-41.

Second, unlike in *GreenBuild*, prior to filing its Supplemental Brief, Complainant did not disclose to Respondent or the Tribunal its reliance upon footnote 30 in the 2020 Penalty Policy Inflation Memo or the Disclosure Rule ERPP matrices and the inflation multiplier related thereto in calculating the penalties in this case. The Prehearing Order issued on January 19, 2023, specifically directed Complainant to provide "all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating the proposed penalty." Prehearing Order at 3. While Complainant's Initial Prehearing Exchange contained an extended list of exhibits and provided a lengthy narrative of its penalty calculations, it did not include the Disclosure Rule ERPP or the 2020 Penalty Policy Inflation Memo. *See* Complainant's Initial PHE at 21-26. To the contrary, Complainant explicitly represented therein that it had relied only upon the RRP ERPP (referred to therein at the "LBP Consolidated ERPP") and the 2018 Penalty Policy Inflation Memo for determining the "Inflation-Adjusted Gravity Based Penalty." Complainant's Initial PHE at 23. Further, although Complainant had an extended opportunity to supplement and amend its prehearing exchange to more fully disclose how its proposed penalties were calculated and provide these documents, it never did so before filing its Supplemental Brief in response to the Default Order.

In *Bollman*, the Environmental Appeals Board ("EAB" or "Board") observed that "proper use of an applicable penalty policy serves to promote the general policies of consistency and fairness in penalty assessments" and "improper application of Agency policy necessarily undercuts the policy's effectiveness." 8 E.A.D. at 187 (citing *Employers Ins. of Wausau*, 6 E.A.D. 735, 760 (EAB 1997) (Order Affirming Initial Decision In Part and Vacating and Remanding In Part) ("[P]roof of adherence to the policy is some evidence of consistency and fairness in enforcement suggesting that, in that sense at least, the proposed penalty is an 'appropriate' one.")). Although this Tribunal accepted the complainant's penalty calculation utilizing the Disclosure Rule ERPP in *GreenBuild*, I am of the opinion that such utilization would be improper here. Therefore, I hold that the penalties for the two hazard

assessment violations for which Respondent was held liable here – specifically, the violation of 40 C.F.R. § 745.84(a) (Renovate Right pamphlet) and 40 C.F.R. § 745.85(a)(1) (post signs) – should be calculated solely using the RRP ERPP and the inflation adjustment factor applicable thereto as set forth in the 2018 Penalty Policy Inflation Memo. Therefore, the appropriate inflation-adjusted gravity-based penalties for these two violations is $8,815 per violation.

C. Complainant's Consideration of Respondent's Ability to Pay

In the Default Order, I noted that the record lacked any affidavit, direct written testimony, or other documentation of the "Testimony of Craig Yussen," which Complainant had indicated it relied upon, along with other documentation, to determine that Respondent was able to pay the proposed penalty. Default Order at 18 (citing Complainant's Initial PHE at 24). In its Supplemental Brief, Complainant responded to this point and, as noted above, submitted the Declaration of Craig Yussen, dated December 22, 2023, as Enclosure C thereto. Supp. Br. at 4-6.

Mr. Yussen, an EPA Compliance Officer with 30 years of experience, states in his Declaration that he was assigned to this case in 2019. Supp. Br. Enc. C ¶¶ 2, 8. As part of his responsibilities, he calculated Complainant's proposed penalties, and in doing so considered Respondent's "ability to pay and effect on ability to continue to do business." Supp. Br. Enc. C ¶¶ 13, 41. As to that factor, Mr. Yussen advises that he relied upon the RRP ERPP as well as EPA's 2015 ATP Guidance. Supp. Br. Enc. C ¶ 42 (citing CX 63, CX 65). That Agency guidance, he recalls, instructed him that "without proof to the contrary, a Respondent's ability to pay may be established with circumstantial evidence relating to a company's size and annual revenue." Supp. Br. Enc. C ¶ 43; *see also* CX 63 at 22. The types of documents generally used by the Agency for this purpose are Dun and Bradstreet Reports and financial information obtained directly from the Respondent. Supp. Br. Enc. C ¶ 43; *see also* CX 63 at 22. In his Declaration, Mr. Yussen acknowledges that unfortunately, in this case, he garnered little information as to Respondent's financial status from the relevant Dun and Bradstreet Report, and despite efforts made, no other publicly accessible financial information on Respondent could be obtained. Supp. Br. Enc. C ¶¶ 44-45. At the same time, he notes that Respondent never raised the issue of ability to pay in this case, despite being given multiple opportunities to do so, and never provided Complainant with any financial statements, tax returns, or other financial documentation reflecting on the issue of ability to pay. Supp. Br. Enc. C ¶¶ 47-48. As a result, in considering this penalty factor, Mr. Yussen states that he primarily relied upon a single sentence from Agency Inspector Paul Ruge's Inspection Report on this matter. Supp. Br. Enc. C ¶ 47. That sentence reads as follows: "Mr. Lauter stated that his company was founded in December 2012, has an annual revenue of $23,600, and has one employee, himself." Supp. Br. Enc. C ¶ 46 (quoting CX 3 at 3). "Although this amount [$23,600] could suggest a possible ability to pay issue, I was unable to corroborate this information anywhere else," Mr. Yussen declares. Supp. Br. Enc. C ¶ 47. "Therefore, I determined that an adjustment to the gravity-based penalty was not warranted based on Respondent's ability to pay a civil penalty." Supp. Br. Enc. C ¶ 49. In its Supplemental Brief, Complainant summarized its position on the issue, stating that "Respondent has not met its burden to demonstrate an inability to pay the calculated civil penalty" and that Complainant, therefore, "did not adjust the penalty based on Respondent's ability to pay or effect on ability to continue in business." Supp. Br. at 6.

New Waterbury is the seminal case on a respondent's ability to pay in environmental enforcement cases. *New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994) (Remand Order). In that case, the EAB held that the complainant bears the burdens of both production and persuasion that the penalty is "appropriate" under Section 16 of TSCA. *Id.* at 536. The EAB further directed:

> [F]or the Region to make a prima facie case on the appropriateness of its recommended penalty, the Region must come forward with evidence to show that it, in fact, considered each factor identified in Section 16 and that its recommended penalty is supported by its analysis of those factors. The depth of consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis a prima facie case can be made. Once this is accomplished, the burden of going forward shifts to the respondent. To rebut the Region's case, a respondent is required to show (1) through the introduction of evidence that the penalty is not appropriate because the Region had, in fact, failed to consider all of the statutory factors or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not "appropriate." Thereafter, in order to prevail on its burden of persuasion the Region must address the respondent's evidence either through the introduction of additional evidence to rebut the respondent's evidence or through cross-examination that will discredit the respondent's contentions.

Id. at 538-39. The EAB also rejected as erroneous the contention that the complainant is required to specifically and separately prove that a respondent has the funds necessary to pay the proposed penalty, declaring that the issue "is not whether the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*." *Id.* at 539.

Here, Complainant proposed a civil monetary penalty in the aggregate amount of $68,288 for the six violations found to have occurred at the Broad Street Property, reduced by the ruling on the two counts discussed above, to approximately $61,438. Complainant's position is that it considered all the TSCA penalty factors, including ability to pay, and believes that the penalty is "appropriate" in light thereof. It takes this position while admitting that the only information it relies upon as to this factor – Respondent's 2019 statement that he founded his business in 2012, he is its only employee, and it has an annual revenue of $23,600 – does not support an ability to pay the proposed penalty. Supp. Br. Enc. C ¶ 47 (citing CX 3 at 3). It attempts to buttress its position that the penalty is nevertheless appropriate by observing that Respondent was provided the opportunity to assert an inability to pay the proposed penalty but declined to do so and offered no financial records to support any penalty reduction. Supp. Br. at 5-6.

The Dun & Bradstreet Report that Complainant obtained opines that Respondent's painting business has a "[m]oderate risk" of both "severe payment delinquency" and "severe financial stress," although it appears these characterizations are based upon only one $1,000 payment experience in the past 24 months. CX 62 at 1, 8. It further recommends a "conservative" credit limit for the business of $2,500 and an "aggressive" limit of $10,000. CX 62 at 4. A review of the Inspection Report indicates

that, in addition to the cited statement, Respondent disclosed that his business had "contracted for ten jobs over the past twelve months," and he provided the Inspector with at least four "Work Agreements" for that period. CX 3 at 3-4. The Work Agreement for the Broad Street property indicated that Respondent was charging $6,125 for his labor. CX 37 at 1, 5. The other agreements identified his labor charges as $3,000, $650, and $750. CX 38 at 2; CX 39 at 2; CX 40 at 2.

The record reflects that Complainant considered each factor identified in Section 16 of TSCA, and perhaps, collectively, the factors support its recommended penalty, particularly since a child of eight years old was potentially exposed to the hazards of lead paint. Default Order at 17-18; *GreenBuild*, 2022 WL 17736440, at *5 (testimony on the dangers of lead paint to children's health). However, I consider the recommended penalty to be clearly inconsistent with the information in the record regarding the financial health of Respondent's business, such that it is not well supported by the specific factor of ability to pay and/or continue in business. Still, it is true that Respondent chose not to participate in this action and did not raise an "inability to pay" claim. The EAB has long held that the language in penalty provisions requiring consideration of "such other factors as justice may require" gives the Presiding Officer "broad discretion to reduce the penalty when the other adjustment factors prove insufficient or inappropriate to achieve justice." *Spang & Co.*, 6 E.A.D. 226, 249 (EAB 1995) (Remand Order). While here I am constrained to determine what exactly an appropriate reduction would be to achieve justice because of Respondent's refusal to participate in this proceeding, based upon the record as it stands, I believe that the proposed penalty is inappropriately high and would not achieve justice. As such, I impose upon Respondent a total penalty of $6,500 for the six violations for which he was found liable.[9]

[9] As noted above, in *Build-It*, the RJO appears to have inappropriately relied on the Agency's Small Business Policy to reduce the total penalty imposed in that case for the four lead-based paint violations from $19,637 to $1,456. *Build-It,* EPA Docket No. TSCA-01-2019-0055 at 15. The respondent in that case had an estimated annual revenue of $148,327. *Id.* In *GreenBuild*, a penalty of $25,609 was imposed upon the respondent for four lead-based paint violations. *GreenBuild*, 2022 WL 17736440, at *34. In that case, the respondent claimed a lack of income but produced no supporting documentation, and financial records gathered by the complainant showed $108,000 in annual sales and work contracts for over $100,000. *Id.* at *14.

CONCLUSION AND ORDER

After consideration of the record in this matter and the penalty factors set forth in Section 16 of TSCA, 15 U.S.C. § 2615, Respondent is hereby assessed an appropriate penalty as set forth below:

1. For the six violations for which Respondent was found liable in this case, Respondent is hereby assessed a total civil penalty of $6,500.

2. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

   Payment shall be made by submitting a certified or cashier's check[10] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

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

   A transmittal letter identifying the subject case and docket number (TSCA-03-2023-0034), as well as Respondent's name and address, must accompany the check.

   If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

3. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 17, 2024
Washington, D.C.

[10] Respondent may also pay by one of the electronic methods described at the following Agency website: https://www.epa.gov/financial/additional-instructions-making-payments-epa.

In the Matter of *Robert Lauter d/b/a Prime Cut Paint*, Respondent. Docket No. TSCA-03-2023-0034

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision and Order on Penalty**, dated April 17, 2024, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Electronic Mail to:
Patrick J. Foley
Conner Kingsley
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 3
Email: foley.patrick.j@epa.gov
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Counsel for Complainant

Emilio Cortes
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Email: clerk_EAB@epa.gov
Email: cortes.emilio@epa.gov

Copy by Electronic, Regular, and Certified Mail to:
Robert Lauter
Prime Cut Paint
1414 Baychester Avenue
Norfolk, VA 23503
Email: primecutpaint@gmail.com
Certified Return Receipt No. 7020-2450-0001-1295-0246
Respondent

Dated: April 17, 2024
Washington, D.C.