



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.)

SUPPLEMENTAL BRIEFING

On November 28, 2023, Chief Administrative Law Judge Susan L. Biro issued a Default Order finding Respondent liable for violations of 40 C.F.R §§ 745.81(a)(2)(ii), 745.89, 745.89(d)(2), 745.84(a)(1), 745.86(b)(6), 745.85(a)(1), 745.89(d)(3), 745.85(a)(2)(ii)(C), and 745.89(d)(3), and Sections 15 and 409 of TSCA, 15 U.S.C. §§ 2614 and 2689, for activities conducted at target housing located at 114 South Broad Street in Suffolk, Virginia ("Broad Street Property"). Default Order at 18. As part of this filing¹, Complainant was ordered to file:

- a. a statement, and any documents in support, explaining in detail its determination that the Extent of Respondent's failure to perform a renovation without the required firm certification was "Minor" and how it arrived at the gravity-based penalty figure of \$12,240 for Respondent's failure to distribute a copy of EPA's Renovate Right pamphlet to the owners of the Broad Street Property and to post appropriate signs at the work site; and
b. complete information about the analysis that Complainant performed regarding Respondent's ability to pay the proposed penalty.

Default Order at 19.

Pursuant to the Default Order, Complainant submits the following:

Minor Extent Determination. As explained in its Initial Prehearing Exchange, Complainant calculated the penalty taking into account the factors set out in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), applied to the particular facts and circumstances of this case with specific reference to EPA's August 2010 "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule ("RRP ERPP"). CX 63. According to the RRP ERPP, the appropriate gravity-based penalty for each violation is determined by considering the relevant "Circumstance Level" (Level 1 to Level 6) and the "Extent Category" (Major, Significant, or Minor). CX 63 at 16-19. The "Circumstance Level" reflects the probability of harm resulting from a particular type of violation, from a high probability of impacting human health and the

¹ The Chief Administrative Law Judge also put Respondent on notice that he may move for the Default Order to be set aside for good cause shown pursuant to 40 C.F.R § 22.17(c). Default Order at 19.

environment (Levels 1 and 2) to a medium probability (Levels 3 and 4), to a low probability (Levels 5 and 6). CX 63 at 17-18. Complainant relied on Appendix A to the RRP ERPP to determine the Circumstance Level of each violation. The “Extent Category” represents the degree, range, or scope of a violation’s potential for harm, categorized whether the potential for damage to human health or the environment is serious (Major), significant (Significant), or a lesser amount (Minor). CX 63 at 18.

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. *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 26-29.

Gravity Based Figures.

Nature of violations. According to the RRP ERPP, the appropriate gravity-based penalty is determined by considering the “Nature” of each violation. CX 63 at 16-17. The Nature of a violation is the essential character of the violation, and incorporates the concept of whether the violation is of a “chemical control,” “control-associated data gathering,” or “hazard assessment” nature. *Id.* With respect to the RRP Rule, the requirements are best characterized as “chemical control” in nature because they are aimed at limiting exposure and risk presented by lead-based paint by controlling how lead-based paint is handled by renovators and abatement contractors. *Id.* In contrast, the requirements of the PRE Rule are best characterized as “hazard assessment” in nature. *Id.* The PRE Rule requirements are designed to provide owners and occupants of target housing, owners and proprietors of child-occupied facilities, and parents and/or guardians of children under the age of 6 in child-occupied facilities, with information that will allow them to weigh and assess the risks presented by renovations and to take proper precautions to avoid the hazards. *Id.* This information is vital to occupants of target housing and child-occupied facilities undergoing renovations or abatements to enable them to take proper precautions to avoid unnecessary exposure, especially to children under the age of 6 and pregnant women, that may be created during a renovation or abatement activity. *Id.* As noted in footnote 48, the RRP ERPP distinguishes violations of PRE Rule (determined to be “hazard assessment” in Nature) by assigning them as Circumstance Level “b” from violations of the RRP Rule (determined to be “chemical control” in Nature) which are assigned as Circumstance Level “a”. CX 63 at 30.

Complainant relied on Appendix A to the RRP ERPP to determine the Circumstance Level and Nature of the violations involving Respondent’s failure to distribute a copy of EPA’s Renovate Right pamphlet to the owners (40 C.F.R. § 745.84(a)(1)) and failure to post appropriate signs at the work site (40 C.F.R. §§ 745.85(a)(1) and 745.89(d)(3)). *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 31 & 35. According to Appendix A, both of these violations are Circumstance “Level 1b” violations. CX 63 at 30. Complainant relied on Appendix B to the RRP ERPP to determine the Extent Category of these violations. As an eight-year old child resided at the Broad Street Property at the time Respondent entered into a contract to perform renovations

(see Default Order at 9)², Complainant determined the Extent Category to be Significant for these violations in accordance with the RRP ERPP. *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 31 & 35.

EPA Regulation and Enforcement of Lead under RLBPHRA and TSCA. In 1992, the United States Congress enacted Title X - Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 United States Code (U.S.C.) § 4851 (enacted as Title X of the Housing and Community Development Act of 1992) (“RLBPHRA”). *See generally* CX 63 at 5. Pursuant to Section 1018 of RLBPHRA, EPA promulgated regulations for the disclosure of lead-based paint and/or lead-based paint hazards in pre-1978 housing offered for sale or lease at 40 C.F.R Part 745, Subpart F. 61 Fed. Reg. 9085 (March 6, 1996), as amended on June 27, 1997 (62 Fed. Reg. 35041). (“Disclosure Rule”). As enacted, the statutory maximum penalty for violations of the RLBPHRA or its implementing regulations was \$10,000³. EPA issued “Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy” in December 2007 (“Disclosure Rule ERPP⁴”).

Section 1021 of RLBPHRA amended the Toxic Substances Control Act (“TSCA”) to add Title IV, entitled “Lead Exposure Reduction.” *See generally* CX 63 at 5. Pursuant to Section 406(b) of TSCA, EPA promulgated residential property renovations regulations, requiring, among other things, persons who perform for compensation a renovation of pre-1978 housing to provide a lead hazard information pamphlet to the owner and occupant prior to commencing the renovation at 40 C.F.R. Part 745, Subpart E. 63 Fed. Reg. 29919 (June 1, 1998) (“PRE Rule”). *Id.* Pursuant to Section 402(c)(3) of TSCA, EPA promulgated regulations amending the PRE Rule⁵ prescribing procedures and requirements for the certification of individuals and firms, and work practice standards for renovation, repair and painting activities in target housing and child occupied facilities. 73 Fed. Reg. 21758 (April 22, 2008) (“RRP Rule”). *Id.* As enacted, the statutory maximum penalty for violations of TSCA or its implementing regulations was \$25,000⁶. EPA issued the RRP ERPP (CX 63) in August 2010⁷.

Penalty Calculations for PRE Rule Violations. Both the RLBPHRA and TSCA require EPA to take into account the statutory factors set forth in Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), in determining the amount of a civil penalty. In order to ensure consistent application of the TSCA penalty factors, EPA adopted the lower statutory maximum of the RLBPHRA when it issued the RRP ERPP incorporating the then existing Disclosure Rule ERPP penalties into the RRP ERPP as Level “b” penalties⁸ (i.e., the penalty amounts in RRP ERPP

² Finding of Fact “5”.

³ 42 U.S.C. § 4852d(b)(5).

⁴ This document is publicly available at <https://www.epa.gov/sites/default/files/documents/1018erpp-1207.pdf>. For convenience, a copy of this document is attached as Enclosure A.

⁵ The PRE Rule was subsequently amended on March 20, 2009 (74 Fed. Reg. 11869), May 6, 2010 (75 Fed. Reg. 24818), August 5, 2011 (76 Fed. Reg. 47938), April 16, 2015 (80 Fed. Reg. 20446) and February 17, 2016 (81 Fed. Reg. 7995).

⁶ 15 U.S.C. § 2615(a)(1). The statutory maximum penalty for violations of TSCA was amended to be \$37,500 on June 22, 2016. P.L. No: 114-182.

⁷ The RRP ERPP was subsequently revised on April 5, 2013.

⁸ As noted in multiple EPA inflation adjustment policies, the Disclosure Rule ERPP and RRP ERPP both penalize violators who fail to provide certain information related to the presence or risk of lead-based paint. Instead of having differing penalty amounts for similar deficiencies, EPA adopted the penalty matrix from the Disclosure Rule ERPP in the PRE Rule component of the RRP ERPP. *See* EPA’s July 27, 2016 “Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (Effective August 1, 2016), footnote 21

Appendix B for circumstance level/nature 1b – 6b violations (CX 63 at 40) are the same as those in the Disclosure Rule ERPP Appendix B for level 1-6 violations occurring on or after March 15, 2004 (Enclosure A at 34). 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. CX 64; *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 31-33, and 35-37. This 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.

Expressed mathematically, Complainant calculated the penalties for the violations involving Respondent’s failure to distribute a copy of EPA’s Renovate Right pamphlet to the owners, and failure to post appropriate signs at the work site as follows:

\$7,740	Circumstance Level 1/Significant Extent (Enclosure A at 34)
1.58136	Multiplier for penalties assessed under the Disclosure Rule ERPP (CX 64 at 14)
\$12,240	Penalty Adjusted for Inflation

Complainant’s Analysis Regarding Respondent’s Ability to Pay.

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), required Complainant to take into account a violator’s ability to pay and effect on ability to continue to do business when determining an appropriate civil penalty.⁹ This duty is further elaborated upon in the RRP ERPP, which provides that “absent proof to the contrary, EPA can establish a Respondent’s ability to pay with circumstantial evidence relating to a company’s size and annual revenue. Once this is done, the burden is on the respondent to demonstrate an inability to pay all or a portion of the calculated civil penalty.” CX 63 at 22. According to EPA’s June 2015 *Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action (ATP*

(<https://www.epa.gov/sites/default/files/2020-12/documents/finalpenaltyinflationguidance.pdf>); EPA’s January 15, 2020 “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”, footnote 30 (<https://www.epa.gov/sites/default/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf>); and EPA’s January 12, 2022 “Amendments to EPA’s Civil Penalty Policies to Account for Inflation (effective January 15, 2022) and Transmittal of the 2022 Civil Monetary Penalty Inflation Adjustment Rule, footnote 35 (https://www.epa.gov/system/files/documents/2022-01/2022amendmentstopenaltypoliciesforinflation_0.pdf).

⁹ “To meet this burden, the EPA must come forward with evidence to show that it considered the factors and that the penalty is appropriate. This does not require the EPA to establish that “the respondent can, in fact, pay a penalty, but whether a penalty is appropriate.” *In New Waterbury*, the EAB rejected the respondent’s claim that, at a penalty hearing, the EPA must, as part of its prima facie case, “introduce specific evidence to show that a respondent has the ability to pay a penalty.” Rather, the EPA needs only to “produce some evidence regarding the respondent’s general financial status from which it can be inferred that the respondent’s ability to pay should not affect the penalty amount.” CX 65 at 3.

Guidance), it is typically sufficient to obtain general financial information directly from the respondent or from publicly available records to make such a finding. *See* CX 65 at 3. The RRP ERPP describes the types of publicly available documents a case team should consider: “To determine the appropriateness of the proposed penalty in relation to a person’s ability to pay, the case team should review publicly-available information, such as Dun and Bradstreet reports, a company’s filings with the Securities and Exchange Commission (when appropriate), or other available financial reports before issuing the complaint.” CX 63 at 22.

Here, Complainant analyzed the limited information available to it in taking into account Respondent’s ability to pay the civil penalty. *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 41-49. Given that Respondent operates a small private business as a sole proprietor, there was relatively little publicly available information for EPA to examine without Respondent’s cooperation. The only public available information concerning Respondent’s business operations was a Dun and Bradstreet Report which contained scant financial information. *See* December 22, 2023 Declaration of Craig Yussen, ¶ 45; CX 62). The Dun and Bradstreet indicated that there was inadequate information to classify the company with a D&B Rating. *See* CX 62 at 1. The Dun and Bradstreet indicated there were no previous bankruptcies found. *Id.* However, there was little to no solid public information in the report with regards to the company’s annual revenue, credit risk, or any ongoing financial difficulties. *See generally* CX 62. Complainant performed additional searches and queries for financial reports and information related to the Respondent without success. *See* December 22, 2023 Declaration of Craig Yussen, ¶ 45.

Further, Complainant received little financial information from the Respondent. The only information available for Complainant to rely upon with regards to Respondent’s annual revenue comes from a statement in Inspector Paul Ruge’s Inspection Report. *See* December 22, 2023 Declaration of Craig Yussen, ¶ 46; CX 3 at 3. During Inspector Paul Ruge’s Records Inspection with Respondent, the Respondent indicated that the company was a sole proprietorship founded in December 2012 with an annual revenue of \$23,600. *See* CX 3 at 3. However, Respondent subsequently refused to engage with EPA personnel to substantiate that statement (*See* December 22, 2023 Declaration of Craig Yussen, ¶ 47), and Complainant was unable to corroborate Respondent’s annual revenue through any other publicly available source or through other information provided by Respondent.

Based on the limited information made available, Complainant was not able to determine that Respondent could not pay the penalty. *See* December 22, 2023 Declaration of Craig Yussen, ¶¶ 41-49. Pursuant to the RRP ERPP, the types of information typically relied on in making ability to pay analyses include tax returns; balance sheets; income statements; statements of changes in financial positions; or statements of assets and liabilities. *See* CX 63 at 22-23. According to EPA’s 2015 ATP guidance, “For the respondent to prove its inability to pay the penalty, it must establish that paying the penalty would cause it to suffer an undue financial hardship and prevent it from paying its ordinary and necessary business expenses.” CX 65 at 4.

Complainant provided ample opportunities for Respondent to provide additional financial information or raise ability to pay concerns. *See* December 22, 2023 Declaration of Craig Yussen, ¶ 48. First, Complainant sent Respondent information regarding its right to raise ability to pay issues and encouraged Respondent to submit a copy of its most recent corporate federal tax returns if it wanted to qualify for a potential reduced penalty as a part of the June 16, 2020

Show Cause Letter (Enclosure B at 3). Complainant followed up with repeated phone calls and emails that afforded Respondent the opportunity to raise ability to pay issues. *See* December 22, 2023 Declaration of Craig Yussen, ¶ 48. After Respondent indicated that he would not engage in any communications with EPA that were not in writing, Complainant either physically mailed or sent electronically follow-up letters to the Respondent on three separate occasions (September 2020, December 2020, & September 2021)¹⁰ which contained copies of the June 16, 2020 Show Cause Letter and other pertinent information on the case. Finally, Complainant informed Respondent of its burden to raise the ability to pay issue in the Administrative Complaint filed December 7, 2022. *See* December 7, 2022 Administrative Complaint at 14. The ability to pay issue was never raised by Respondent following these multiple opportunities.

Despite Complainant's best efforts, Respondent never furnished any additional financial information for consideration. Nor did Respondent raise the ability to pay issue in its answer, at any other time during EPA's investigation, or during these administrative proceedings. As such, Respondent has not met its burden to demonstrate an inability to pay the calculated civil penalty. For the reasons outlined above, Complainant did not adjust the penalty based on Respondent's ability to pay or effect on ability to continue in business.

Respectfully submitted,

Patrick Foley
Assistant Regional Counsel

¹⁰ Copies of these follow-up letters were not included as Complainant's Exhibits to Chief Judge Biro as they contained information relevant to offers of settlement.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Mr. Robert Lauter d/b/a Prime Cut Paint)	DOCKET NO: TSCA-03-2023-0034
1414 Baychester Ave.)	
Norfolk, VA 23503)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, copies of the Supplemental Briefing, including Enclosures A & B, and the December 22, 2023 Declaration of Craig Yussen, were served upon the persons listed in the manner indicated.

Original and one copy via THE OALJ E-Filing System

Mary Angeles, Headquarters Hearing Clerk
U.S Environmental Protection Agency
Office of Administrative Law Judges

One copy via THE OALJ E-Filing System

Susan L. Biro, Chief Administrative Law Judge
U.S Environmental Protection Agency
Office of Administrative Law Judges

One copy via UPS overnight mail (with a courtesy copy sent by email):

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12/27/23
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