

PENALTY CALCULATION SUMMARY

Violation	Circumstance	Extent	40 C.F.R. §§	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	\$4,500
Count 2	3a	Minor	745.89(d)(1)	\$4,500
Count 4	2a	Minor	745.85(a)(2)(ii)(C)	\$6,000
Gravity-Based Penalty				\$15,000
Inflation Adjustment (Gravity-Based Penalty x 1.08203)				\$16,230
Count 3	1b	Minor	745.85(a)(1)	\$2,580
Gravity-Based Penalty				\$2,580
Inflation Adjustment (Gravity-Based Penalty x 1.64990)				\$4,257
Total Inflation-Adjusted Gravity-Based Penalty				\$20,487
Culpability Factor (25% of the inflation adjusted Gravity-Based Penalty)				\$5,122
TOTAL				\$25,609

PENALTY CALCULATION NARRATIVE

Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and 40 C.F.R. Part 19 authorizes EPA to assess administrative penalties for violations of TSCA up to \$40,576 for each violation, each day such a violation continues. To determine the appropriate penalty to assess, EPA considers the nature, circumstances, extent of the violations and, with respect to the Respondent, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. TSCA § 16(a)(2)(B).

In order to calculate the appropriate penalty for any given case, EPA relies on the *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* (Aug. 2010) (“RRP ERP”), and the *2020 Penalty Policy Inflation Memo and 2020 Penalty Inflation Rule* (Jan. 2020) (“2020 Inflation Memo”). Depending on the type of violation alleged in a case, EPA also relies

on the *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) (“Section 1018 ERP”).

I. Determining the Appropriate Penalty

According to the RRP ERP, EPA first determines the number of independently assessable violations, and considers whether Respondent realized any economic benefit from its noncompliance. RRP ERP at 8. EPA then calculates a gravity-based penalty by considering the nature, circumstances, and extent of the violations. RRP ERP at 9. Then, after applying the appropriate inflation adjustment, *see* 2020 Inflation Memo at 14, EPA determines whether any gravity-based penalty adjustments are appropriate.

The calculation of an appropriate penalty can be visually represented as follows:

$$\text{Penalty} = \text{Economic Benefit} + \text{Gravity} \pm \text{Gravity Adjustment Factors} - \text{Litigation Considerations} - \text{Ability to Pay} - \text{Supplemental Environmental Projects}$$

A. Independently Assessable Violations

According to the RRP ERP, each requirement of the RRP Rule is a separate and distinct requirement and the failure to comply with any such requirement is an independently assessable violation. RRP ERP at 10. Here, GreenBuild Design & Construction, LLC (GreenBuild) failed to comply with at least four requirements of the RRP Rule. Therefore, EPA has determined that there is sufficient evidence to support the assessment of four separate violations.

B. Economic Benefit Component

The RRP ERP provides that civil penalties generally should, at a minimum, remove any significant economic benefit resulting from failure to comply with the law. RRP ERP at 11. The cost to come into compliance with the RRP Rule is approximately \$550 to \$600—\$300 for firm certification and \$250 to \$300 for renovator certification. As the cost to comply with the RRP

Rule's requirements can be split over multiple renovations, GreenBuild's cost-share associated with any given renovation is likely negligible. EPA therefore determined that GreenBuild's economic benefit from noncompliance was insignificant and therefore has not included an economic benefit component in the penalty.

C. Gravity Component

EPA determines the appropriate penalty for each violation of the RRP Rule by considering the relevant "Circumstance Level" (Level 1 through Level 6) and the "Extent Category" (Major, Significant, or Minor) assigned to each violation in the Penalty Policy. RRP ERP at 15-17.

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 environment (Levels 1 and 2) to a medium probability (Levels 3 and 4), to a low probability (Levels 5 and 6). RRP ERP at 15-16. EPA relied on Appendix A to the RRP ERP to determine the circumstance level of each violation. *See* RRP ERP at A-1. According to Appendix A, the circumstance level for violation 1 is 3a, for violation 2 is 3a, for violation 3 is 1b, and for violation 4 is 2a. *See* RRP ERP at A-3, A-3, A-1, and A-5, respectively.

The "Extent Category" represents the degree, range, or scope of a violation's potential for harm. RRP ERP at 16. The measure of the extent of harm focuses on the overall intent of the RRP Rule and the amount of harm the rules are designed to prevent. *Id.* The primary consideration for determining the extent of harm to be considered is whether the specific violation could have a serious or significant or minor impact on human health, with the greatest concern being for the health of a child under 6 years of age and a pregnant woman in target housing. *Id.* The Extent Categories are defined as: "Major" if a child under the age of six or a

pregnant woman is affected, “Significant” if a child between six and 18 years old is affected, and “Minor” if no child is affected. RRP ERP at 16, Appendix B.

Here, EPA had knowledge that there was no child under the age of 18 in the Turnagain Property during the renovation. Therefore, according to the RRP ERP, the extent level for each of the violations identified above is Minor. RRP ERP at 16-17, Appendix B-2.

1. Violations 1, 2 and 4

For violations 1, 2, and 4, EPA relied on Appendix B to the RRP ERP to determine the gravity-based penalty for each violation. *See* RRP ERP at B-2. Appendix B of the RRP ERP provides that for each violation occurring after January 12, 2009, with a circumstance level of 3a and a minor extent level, the gravity-based penalty is \$4,500. RRP ERP at B-2. Appendix B of the RRP ERP provides that for each violation occurring after January 12, 2009, with a circumstance level of 2a and a minor extent level, the gravity-based penalty is \$6,000. RRP ERP at B-2. EPA then adjusted the gravity-based penalty for inflation by multiplying the total gravity-based penalty by 1.08203, 2020 Inflation Memo at 14, as depicted below:

Violation	Circumstance	Extent	40 C.F.R. Part 745	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	\$4,500
Count 2	3a	Minor	745.89(d)(1)	\$4,500
Count 4	2a	Minor	745.85(a)(2)(ii)(C)	\$6,000
Gravity-Based Penalty				\$15,000
Inflation Adjustment (Gravity-Based Penalty x 1.08203)				\$16,230

2. Violation 3

EPA treated violation 3 differently for the purposes of determining the appropriate gravity-based penalty. Rather than relying solely on the RRP ERP, EPA also refers to the Section 1018 ERP for violation 3. The rationale for this practice is explained in the 2020 Inflation Memo. Footnote 30 to the 2020 Inflation Memo reads:

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 Inflation Memo at n.30. Violation 3 is, therefore, a circumstance level 1b, extent level minor violation. As such, the appropriate penalty for violation 3 is \$2,580. *See* Section 1018 ERP at 30 (Gravity-Based Penalty Matrix for violations occurring on or after March 15, 2004: Level 1 Minor).

After determining the gravity-based penalty for violation 3, EPA then accounted for inflation by multiplying the gravity-based penalty by 1.64990, *see* 2020 Inflation Memo at 14, as depicted below:

Count 3	1b	Minor	745.85(a)(1)	\$2,580
Gravity-Based Penalty				\$2,580
Inflation Adjustment (Gravity-Based Penalty x 1.64990)				\$4,257

Therefore, the total gravity-based penalty that EPA calculated for GreenBuild’s four violations of TSCA and the RRP Rule is as follows:

Violation	Circumstance	Extent	40 C.F.R. Part 745	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	\$4,500
Count 2	3a	Minor	745.89(d)(1)	\$4,500
Count 4	2a	Minor	745.85(a)(2)(ii)(C)	\$6,000
Gravity-Based Penalty				\$15,000
Inflation Adjustment (Gravity-Based Penalty x 1.08203)				\$16,230

Count 3	1b	Minor	745.85(a)(1)	\$2,580
Gravity-Based Penalty				\$2,580
Inflation Adjustment (Gravity-Based Penalty x 1.64990)				\$4,257
Total Inflation-Adjusted Gravity-Based Penalty				\$20,487

D. Gravity-Based Adjustment Factors

After determining the appropriate inflation-adjusted gravity-based penalty, EPA considered whether any additional factors warranted modifying the gravity-based penalty. *See* RRP ERP at 17.

1. Ability to Pay Factor

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires EPA to take into account a violator’s ability to pay when determining an appropriate civil penalty. This duty is further elaborated upon in the RRP ERP, 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.” RRP ERP at 20.

Here, EPA analyzed all information available to it in order to determine whether GreenBuild had the ability to pay a civil penalty. *See* CX 75 to 78; CX 8 to 9. Based on that analysis, EPA determined that GreenBuild would be able to pay such a penalty. In order to meet its burden to demonstrate an inability to pay a civil penalty, GreenBuild must submit financial information such as three to five years of its tax returns; balance sheets; income statements; statements of changes in financial positions; and statements of assets and liabilities. *See* RRP ERP at 20-21. *See also*, Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action (June 2015), at 5.

To date, GreenBuild has not submitted sufficient additional information from which EPA is able to determine that GreenBuild is unable to pay a civil penalty. As such, GreenBuild has not met its burden to demonstrate an inability to pay all or a portion of the calculated civil penalty. RRP ERP at 20. Therefore, EPA has not adjusted the penalty based on Respondent's inability to pay.

2. History of Prior Violations

EPA is unaware of any prior instances in which GreenBuild has been cited for violations of the lead-based paint regulations at 40 C.F.R. Part 745 in the past five years. As such, EPA did not adjust the penalty for this factor.

3. Degree of Culpability

The RRP ERP provides that this factor may be used to increase or decrease a gravity-based penalty. RRP ERP at 18. Knowing or willful violations reflect an increased responsibility on the part of the violator and may give rise to criminal liability. *Id.* The liability of the violator is reflected in the amount of the penalty which may be increased by up to 25% for this factor. *Id.* EPA is aware that the violator had control over the events constituting the violations, had knowledge of the regulations, and knew the legal requirements it violated. Therefore, EPA determined that the following reasons justified an increase of the gravity-based penalty due to GreenBuild's culpability:

Prior to the July 25, 2018 inspection, EPA contacted GreenBuild via both letter and telephone calls to explain the RRP Rule requirements. *See, e.g.,* CX 80-82. GreenBuild was advised that if the company intended to work on pre-1978 residences and/or child occupied facilities, then GreenBuild would need to certify the firm and assign a certified renovator and/or hire individuals trained by a certified renovator for all jobs covered by the RRP Rule

requirements. *See, e.g.*, CX 82, 85. GreenBuild appeared to understand the RRP Rule requirements and its applicability to the permits it obtained for target housing. GreenBuild was also invited to attend an in-person Recordkeeping Inspection with Ms. Farnham and Mr. Hamlet, so that they could further explain the RRP Rule requirements. *See* CX 82-83. GreenBuild did not show up for that inspection. *See* CX 83, 84.

On April 12, 2018, Ms. Tartaglia called GreenBuild to discuss the RRP Rule requirements. Then on April 25, 2018, EPA sent an advisory letter as a follow up to the April 12, 2018, telephone conversation. *See* CX 85. The letter reminded GreenBuild of the RRP Rule requirements and advised GreenBuild to obtain the RRP firm and renovator certifications prior to working on a pre-1978 residential property.

Despite multiple warnings from EPA, GreenBuild did not get certified. So, on July 25, 2018, EPA went to GreenBuild's job site and performed an unannounced workplace inspection. *See* CX 7. As part of that inspection, Ms. Farnham had a detailed conversation with GreenBuild about its requirements under the RRP Rule. CX 7.

On July 30, 2018, just five days after the July 25, 2018 inspection, GreenBuild obtained another building permit at a pre-1978 target house. *See* CX 87, 88. This action, and GreenBuild's ongoing noncompliance in spite of repeated attempts by EPA to educate Respondent about the RRP Rule, shows that GreenBuild disregarded the information Ms. Farnham, Mr. Hamlet, and Ms. Tartaglia provided. GreenBuild disregarded the repeated warnings EPA provided it and continued to offer, perform, or claim to perform renovation work on a pre-1978 residential property.

Therefore, EPA determined that a 25% upward adjustment to the penalty was appropriate based on GreenBuild's culpability.

4. Attitude

The RRP ERP allows for a reduction of up to 30% of the gravity-based penalty to account for GreenBuild's attitude. RRP ERP at 24. This reduction includes 10% for cooperation, which refers to GreenBuild's response to the compliance evaluation and enforcement process; 10% for compliance, which refers to good-faith efforts to come into compliance; and another 10% for early settlement, which is available in cases where settlement is reached before the exchange of prehearing documents. *Id.*

EPA does not believe that an adjustment based on GreenBuild's attitude is warranted. First, GreenBuild has not cooperated with EPA's efforts during the compliance evaluation and enforcement process. GreenBuild was invited, and agreed, to attend an in-person inspection on October 12, 2017 but failed to show up for that inspection. *See* CX 82, 83, 84, 85. On July 2, 2018, EPA sent Greenbuild a letter requesting that it attend an in-person inspection on July 26, 2018. Greenbuild did not respond to this letter.

Second, GreenBuild did not take good-faith efforts to come into compliance. On July 30, 2018, five days after the July 25, 2018 inspection, GreenBuild obtained another building permit in target housing, R18-2270, despite being informed of the RRP Rule requirements. *See* CX 87, 88. GreenBuild did not obtain its EPA firm certification until August 10, 2018. *See* CX 11, 12, 13.

Finally, GreenBuild did not agree to settle this case at all, let alone early, and therefore does not qualify for the 10% reduction based on early settlement.

5. Other Factors as Justice May Require

The RRP ERP allows for an additional 25% reduction for other factors as justice may require. RRP ERP at 23. This allows EPA to consider compelling factors that may not have been

considered using the RRP ERP or unusual circumstances that suggest strict application of the RRP ERP is inappropriate. *Id.* Use of this reduction is rare but can be considered. EPA is not aware of any factors that would warrant adjustment of the penalty based on other factors as justice may require, and as such did not adjust the penalty based on this factor.

II. Appropriate Penalty

Accordingly, based on a consideration of the nature, circumstances, extent of the violations and, with respect to the GreenBuild, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require, *see* TSCA § 16(a)(2)(B) and RRP ERP, EPA believes that \$25,609 is an appropriate penalty for GreenBuild’s four violations of TSCA § 409 and the RRP Rule, as depicted below:

Violation	Circumstance	Extent	40 C.F.R. Part 745	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	\$4,500
Count 2	3a	Minor	745.89(d)(1)	\$4,500
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Gravity-Based Penalty				\$2,580
Inflation Adjustment (Gravity-Based Penalty x 1.64990)				\$4,257
Total Inflation-Adjusted Gravity-Based Penalty				\$20,487
Culpability Factor (25% of the inflation adjusted Gravity-Based Penalty)				\$5,122
TOTAL				\$25,609