

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	Docket No. TSCA-10-2021-0006
GREENBUILD DESIGN &)	
CONSTRUCTION, LLC)	COMPLAINANT’S HEARING
)	BRIEF
Anchorage, Alaska)	
)	
Respondent.)	
)	
Proceeding pursuant to TSCA Section 16,)	
15 U.S.C. § 2615(a).)	
_____)	

HEARING BRIEF

COMES NOW, the United States Environmental Protection Agency (Complainant), by and through its undersigned counsel and pursuant to this Court’s January 10, 2022 prehearing order, to respectfully offer the following hearing brief.

TABLE OF CONTENTS

I. INTRODUCTION 3

 A. Statutory and Regulatory Background 4

 B. Factual Background..... 7

 C. Procedural History of Case 9

II. PROPOSED PENALTY 10

 A. The Proposed Penalty is Reasonable based on the Statutory Factors 11

 B. The Proposed Penalty is Reasonable based on the RRP Penalty Policy 11

 1. Independently Assessable Violations 12

 2. Economic Benefit..... 12

 3. Gravity Component 12

 a. Violations 1, 2, and 4..... 14

 b. Violation 3..... 15

 4. Gravity-Based Adjustment Factors 16

 a. Ability to Pay..... 16

 b. History of Prior Violations 17

c. Degree of Culpability	17
d. Other Factors as Justice May Require.....	19
III. CONCLUSION.....	20
ATTACHMENT 1	22

TABLE OF AUTHORITIES

Cases

<i>In re: DIC Americas, Inc.</i> , 6 E.A.D. 184, 1995 WL 646512 at *4 (EAB 1995).	10, 11
<i>In the Matter of: Freedom Performance, LLC</i> , 2020 WL 978714 at * 12 (EPA, 2020)	11
<i>New Waterbury, Ltd.</i> , 5 E.A.D. 529 (EAB 1994)	10

Statutes

Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of 12, 15, and 42 U.S.C.).....	4, 5
Section 16(a) of TSCA, 15 U.S.C. § 2615(a)	passim
Section 402 of TSCA, 15 U.S.C. § 2682	5
Section 409 of TSCA, 15 U.S.C. § 2689	7, 20
Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 to 2697.....	3

Other Authorities

<i>2020 Penalty Policy Inflation Memo and 2020 Penalty Inflation Rule</i> (Jan. 2020).....	passim
<i>Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Paint Rule; and Lead-Based Paint Activities Rule</i> (Aug. 2010). passim	
<i>Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action</i> memorandum (Jun 29, 2016)	10
<i>Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy</i> (Dec. 2007).....	10, 15

Rules

Lead; Renovation, Repair, and Painting Program,” 73 Fed. Reg. 21692-01 (Tuesday, April 22, 2008)	5, 6
Lead; Requirements for Hazard Education Before Renovation of Target Housing.” 63 Fed. Reg. 29908-01 (Monday, June 1, 1998).....	5

Regulations

40 C.F.R. § 745.89	7
40 C.F.R. § 22.27	10, 11
40 C.F.R. § 745.81	7, 19
40 C.F.R. § 745.85	7
40 C.F.R. § 745.87	7
40 C.F.R. Part 19.....	11
40 C.F.R. Part 745, Subpart E.....	3, 17

I. INTRODUCTION

GreenBuild Design & Construction, LLC (Respondent) placed human health and the environment at risk by repeatedly performing renovations in target housing without complying with the lead safe work practice standards and other requirements of the Toxic Substances Control Act (TSCA),¹ 15 U.S.C. §§ 2601 to 2697, and the federal regulations promulgated thereunder. Those regulations are set forth at 40 C.F.R. Part 745, Subpart E and are known as the Lead Renovation, Repair and Painting Rule, or “RRP Rule.” This Court agreed that Respondent violated TSCA and the RRP Rule during a renovation of 2208 Turnagain Parkway in Anchorage, Alaska (the “Turnagain Property”) and granted Complainant’s motion for accelerated decision as to liability on November 17, 2021.

Complainant has proposed that a \$25,609 penalty be assessed against Respondent for these violations. Such a penalty is reasonable because it accounts for the potential harm that Respondent’s violations posed to human health and the environment. The RRP Rule is designed to protect people from the serious and deleterious effects of lead poisoning. Companies performing renovations of pre-1978 properties must comply with the RRP Rule requirements to ensure that people, and especially young children, are protected from the dangers of lead contamination in and around their homes. It is crucial that the many companies and individuals who comply with the RRP Rule continue to do so. And it is imperative that those who do not understand that EPA will impose meaningful penalties for failing to comply with the RRP Rule and placing human health and the environment at risk.

In calculating this penalty, Complainant has considered the nature, circumstances, extent, and gravity of the violations and, with respect to the Respondent, its ability to pay, effect on

¹ For a list of relevant acronyms, please see Attachment 1.
In the Matter of: GreenBuild Design & Construction, LLC
Docket Number: TSCA-10-2021-0006
Complainant’s Hearing Brief
Page 3 of 22

ability to continue to do business, history of prior such violations, degree of culpability, and such other matters as justice may require. TSCA § 16(a), 15 U.S.C. § 2615(a). Complainant’s penalty calculation is consistent with the *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Paint Rule; and Lead-Based Paint Activities Rule* (Aug. 2010) (“RRP ERP”), CX 96, and other relevant guidance.² Therefore, this Court should find that \$25,609 is a reasonable penalty for Respondent’s violations.

A. Statutory and Regulatory Background

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act (“the Act”) in response to finding that low-level lead poisoning was widespread among American children, that pre-1980 American housing stock contained more than three million tons of lead in the form of lead-based paint, and that the ingestion of lead from deteriorated or abraded lead-based paint was the most common cause of lead poisoning in children. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of 12, 15, and 42 U.S.C.); CX 100 at 179.

In the Act, Congress determined that the health and development of children is endangered by chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes, and that the danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent paint deterioration and limit children’s exposure to lead dust and chips. *Id.* Therefore, Congress added a new title to TSCA entitled “Title IV-Lead Exposure Reduction,” with the stated purposes of, *inter alia*, encouraging effective action to prevent childhood lead poisoning by establishing a workable framework for

² In this brief, Complainant will cite to the exhibits it placed in the record as they have been identified pursuant to this Court’s February 3, 2021 prehearing order. Where applicable, citations to page numbers refer to the CX page numbers and not the root document page numbers.

lead-based paint hazard evaluation and reduction, and ensuring that the existence of lead-based paint hazards is considered in the sale, rental, and renovation of homes and apartments. *Id.*

Section 402 of TSCA, 15 U.S.C. § 2682, authorizes the Administrator of the EPA to promulgate final regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified. The Administrator of the EPA promulgated these regulations in 40 C.F.R. Part 745.

On June 1, 1998, EPA published the final rule “Lead; Requirements for Hazard Education Before Renovation of Target Housing.” 63 Fed. Reg. 29908-01 (Monday, June 1, 1998); CX 101. In its public notice, EPA spoke about the risks that lead-based paint poses to human health and the environment. EPA noted that lead “is harmful to individuals of all ages, [and] can be especially damaging to children, fetuses, and women of childbearing age.” 63 Fed. Reg. at 29909. “Lead poisoning has been called ‘the silent disease’ because its effects may occur gradually and imperceptibly.” *Id.* Lead exposure has “been associated with learning disabilities, growth impairment, permanent hearing and visual impairment, and other damage to the brain and nervous system. In large doses, [it] can cause blindness, brain damage, convulsions and even death.” *Id.* at 29909 to 10. These concerns led the Secretary of the U.S. Department of Health and Human Services to “characterize lead poisoning as the ‘number one environmental threat to the health of children in the United States.’” *Id.*

On April 22, 2008, EPA promulgated another final rule entitled “Lead; Renovation, Repair, and Painting Program,” 73 Fed. Reg. 21692-01 (Tuesday, April 22, 2008); CX 102, where it addressed lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in target housing and child occupied facilities. 73 Fed. Reg. at

21693. In promulgating this rule, EPA spoke at length about the dangers of lead. EPA noted that “lead has been demonstrated to exert ‘a broad array of deleterious effects on multiple organ systems via widely diverse mechanisms of action’ . . . includ[ing] neurological development and function; reproduction and physical development; kidney function; cardiovascular function; and immune function.” *Id.* EPA then went on to discuss, among other things, the neurotoxic effects that lead shows in children, the neurocognitive decrements associated with relatively low blood lead concentrations in young children, associations between lead exposure and deleterious cardiovascular outcomes, and sensory, motor, cognitive, and behavioral impacts associated with lead neurotoxicity in childhood. *Id.* It noted that “effects of lead on neurobehavior have been reported with remarkable consistency across numerous studies of various designs, population studies, and developmental assessment protocols.” *Id.*

After discussing the health risks associated with lead exposure, EPA went on to discuss some potential lead exposure pathways. It noted that:

House dust is the most common exposure pathway through which children are exposed to lead-based paint hazards. . . . Children, particularly younger children, are at risk for high exposures of lead-based paint dust via hand-to-mouth exposure, and may also ingest lead-based paint chips from flaking paint on walls, windows, and doors. Lead from exterior house paint can flake off or leach into the soil around the outside of a home, contaminating children’s play areas. Cleaning and renovation activities may actually increase the threat of lead-based paint exposure by dispersing lead dust particles in the air and over accessible household surfaces. In turn, both adults and children can receive hazardous exposure by inhaling the dust or by ingesting lead-based paint during hand-to-mouth activities.

Id. at 21694.

To account for the dangers associated with lead-based paint and lead exposure, generally, EPA’s Lead; Renovation, Repair, and Painting Program final rule established two main requirements that are relevant to this matter: (1) Training, accreditation, and certification requirements; and (2) Work practice standards. *Id.* at 21702 to 03. Specifically, the RRP Rule, 40

C.F.R. Part 745, Subpart E, sets forth procedures and requirements for, *inter alia*, the certification of renovation firms and individual renovators; work practice standards for renovation, repair, and painting activities in target housing and child occupied facilities; and who may perform such renovation, repair, and painting activities. *See* 40 C.F.R. §§ 745.81(a)(2)-(3), 745.85(a)(2), 745.89(a), and 745.89(d)(3). The failure or refusal to comply with any provision of the RRP Rule is a violation of Section 409 of TSCA, 15 U.S.C. § 2689. 40 C.F.R. § 745.87(a).

B. Factual Background

Respondent is a limited liability company with its principal place of business in the State of Alaska. CX 75. Respondent performs general contractor services, primarily construction of single-family homes, including new construction, additions, alterations, remodeling, and repair. CX 76. Mr. Rodrigo and Mrs. Kari Ann von Marees co-own Respondent. CX 75; CX 78.

From 2015 through 2018, Complainant had reason to believe that Respondent was regularly violating TSCA and the RRP rule by performing or offering to perform renovations in target housing without first obtaining its EPA firm certification, as required by 40 C.F.R. § 745.81(a)(2)(ii). *See* CX 05 at 5; CX 06 at 2–3. During this time period, Complainant communicated with Respondent multiple times about Respondent’s responsibilities under TSCA. *See e.g.*, CX 83 at 3 (October 12, 2017 Inspection Report noting that Complainant had previously sent three notices of inspection letters to Respondent).³ Complainant attempted to schedule in-person inspections with Respondent on December 9, 2015, July 13, 2017, October

³ *See also*, CX 80 (June 27, 2017 Notice of Inspection Letter); CX 81 (September 25, 2017 Notice of Inspection Letter); CX 82 (Telephone call log noting that on October 4, 2017, EPA TSCA Inspector, Mr. Rob Hamlet spoke with Mr. von Marees about attending an in-person TSCA RRP Rule inspection which was scheduled for October 12, 2017); CX 83–84 (No Show Inspection Reports indicating that Respondent failed to show up for the October 12, 2017 inspection); CX 85 (April 25, 2018 letter to Respondent informing it of its responsibilities under TSCA and the RRP Rule).

12, 2017, in an attempt to help Respondent come into compliance with TSCA and the RRP Rule. *Id.* But Respondent disregarded each of these attempts and failed to show up for any of the scheduled in-person inspections. CX 80; 83–84.

Throughout this period, Respondent continued to obtain building permits to perform renovations on target housing without first obtaining its EPA firm certification, including building permit R18-1823 for work to be completed on the Turnagain Property. CX 68–72. As Complainant was preparing to conduct TSCA RRP inspections in Anchorage, Alaska in 2018, it decided to schedule another in-person inspection with Respondent. CX 92 (Notice of Inspection Letter scheduling an in-person inspection on July 26, 2018). Recognizing that Respondent had failed to show up for any of the previously scheduled in-person inspections, EPA TSCA Inspector Mr. Rob Hamlet telephoned Respondent on July 25, 2018, to make sure that it was planning on attending the inspection scheduled for the next day. CX 05 at 6. Respondent replied that it would be unable to attend that inspection and requested to reschedule. *Id.* Mr. Hamlet agreed and rescheduled the in-person inspection. *Id.*

Mr. Hamlet suspected that Respondent would fail to show up for the rescheduled inspection. *Id.* So, EPA Inspectors Ms. Kim Farnham and Mr. Hamlet decided to drive past Respondent’s work site to see if Respondent was there. CX 05 at 06; CX 04A at 7. When Ms. Farnham and Mr. Hamlet arrived at the Turnagain Property on July 25, 2018, Respondent was actively performing renovation activities on the residence, so they decided to perform an unannounced worksite inspection. CX 07; CX 04A at 8–9, CX 05 at 6–8. Mr. Hamlet proceeded to walk around the Turnagain Property making observations and taking pictures, *see* CX 14 to 55 (inspection photos), while Ms. Farnham had a detailed conversation with Mr. von Marees about the RRP Rule and its requirements. CX 07; CX 04A at 9; CX 05 at 6–8. Ms. Farnham “stated the

requirements of the RRP Rule and explained that it requires firms to be certified to perform renovations on target housing.” CX 04A at 8.

Approximately 5 days later, on July 30, 2018, Respondent obtained another building permit to perform a renovation in target housing. *See* CX 87 (Building permit R18-2770 for 4220 Tahoe Drive, with final reviews completed on “7/30/2018” indicating that the building permit was issued on or about July 30, 2018); CX 88 (Public inquiry parcel detail noting that 4220 Tahoe Drive was built in 1969). Respondent did not obtain its EPA firm certification until August 10, 2018. CX 11.

C. Procedural History of Case

On December 2, 2020, Complainant filed the complaint in this matter. Based on Ms. Farnham and Mr. Hamlet’s observations made during the July 25, 2018 inspection of the Turnagain Property, Complainant alleged that Respondent committed four violations of TSCA and the RRP Rule.⁴ Respondent filed its Answer on January 27, 2021. The Parties completed the prehearing exchange on May 24, 2021. Complainant moved for accelerated decision as to liability on June 23, 2021. This Court granted Complainant’s motion for accelerated decision on November 17, 2021 and scheduled the penalty hearing to begin on May 2, 2022.

On April 4, 2022, this Court granted Complainant’s motion in limine excluding “Respondent from entering any evidence relevant to inability to pay into evidence at the hearing.” April 4, 2022 Order Granting Complainant’s Motion in Limine, at 9. This Court noted

⁴ Specifically, Complainant alleged that Respondent failed to obtain EPA firm certification, pursuant to 40 C.F.R. § 745.89, prior to performing or offering to perform renovations in target housing, in violation of 40 C.F.R. § 745.81(a)(2)(ii); failed to ensure that its employees were certified renovators or trained by certified renovators, in violation of 40 C.F.R. § 745.89(d)(2); failed to post warning signs, in violation of 40 C.F.R. §§ 745.85(a)(1) and 745.89(d)(3); and failed to cover the ground with impermeable materials or isolate the work area, in violation of 40 C.F.R. §§ 745.85(a)(2), (a)(2)(ii)(C), and 745.89(d)(3).

that “Respondent has been repeatedly ‘apprised’ of its obligation to produce evidence supporting its claim of an inability to pay.” *Id.* (citing *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994)). And that “there is no justification for continuing to prevail upon Respondent to submit documentation in support of its assertion of inability to pay when it has had notice and an extended opportunity to produce such documentation and has clearly chosen not to do so.” *Id.* Accordingly, consistent with 40 C.F.R. § 22.19(g), this Court inferred “from Respondent’s failure to comply with the Prehearing Order, and subsequent entreaties by [Complainant], that any information Respondent could produce would be adverse to its inability to pay claim.” *Id.*

II. PROPOSED PENALTY

Complainant has proposed a \$25,609 penalty in this matter. Such a penalty is warranted here because it accounts for the potential harm that Respondent’s violations posed to human health and the environment. In calculating this penalty, Complainant considered the statutory factors established in Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and applied the applicable penalty policies, including the RRP ERP, CX 96, the *2020 Penalty Policy Inflation Memo and 2020 Penalty Inflation Rule* (Jan. 2020) (“2020 Inflation Memo”), CX 98, the *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) (“Section 1018 ERP”), CX 97, and the *Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action* memorandum (June 29, 2016) (“ATP Memo”), CX 99.

EPA “developed penalty policies to assure that Regional enforcement personnel calculate civil penalties that are not only appropriate for the violations committed but are assessed fairly and consistently.” *In re: DIC Americas, Inc.*, 6 E.A.D. 184, 1995 WL 646512 at *4 (EAB 1995).

This Court “must consider any civil penalty guidelines issued under the Act,” 40 C.F.R.

§ 22.27(b), but such policies are not binding on it. Rather, this Court has “wide discretion to

adopt, reject, or deviate from the rationale of an applicable penalty policy where appropriate.” *In the Matter of: Freedom Performance, LLC*, 2020 WL 978714 at * 12 (EPA, 2020) (citing *DIC Americas* at *4; 40 C.F.R. § 22.27(b)).

A. The Proposed Penalty is Reasonable based on the Statutory Factors

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 \$43,611 for each violation, each day such a violation continues. To determine the appropriate penalty to assess, TSCA requires EPA to consider the nature, circumstances, extent, and gravity 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).

To ensure national consistency in assessing penalties under TSCA and the RRP Rule, EPA published the RRP ERP. CX 96. The goal of the RRP ERP “is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations.” CX 96 at 4. Accordingly, regional enforcement personnel utilize the applicable penalty policies as a mechanism through which to ensure that the statutory factors are properly considered. *DIC Americas* at *4.

B. The Proposed Penalty is Reasonable based on the RRP Penalty Policy

Pursuant to the RRP ERP, when Complainant calculated the proposed penalty in this matter, Complainant first determined the number of independently assessable violations and considered whether Respondent realized any economic benefit from its noncompliance. CX 96 at 10. Complainant then calculated a gravity-based penalty for each of the four violations by considering the nature, circumstances, and extent of the violations. CX 96 at 11. Then, after

applying the appropriate inflation multiplier, *see* CX 98 at 14, Complainant determined whether any adjustments to the gravity-based penalty were warranted.

1. 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. CX 96 at 12. Here, Respondent failed to comply with four requirements of the RRP Rule. *See* Nov. 17, 2021 Order on motion for accelerated decision. Therefore, sufficient evidence exists in the record to support the assessment of four separate violations.

2. Economic Benefit

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. CX 96 at 13. Complainant has previously determined that the cost to come into compliance with the RRP Rule is approximately \$550 to \$600—\$300 for firm certification, CX 13, plus approximately \$250 to \$300 for renovator certification. As the cost to comply with the RRP Rule’s requirements can be split over multiple renovations, Respondent’s cost-share associated with any given renovation is negligible. Complainant therefore determined that Respondent did not derive significant economic benefit through its noncompliance at the Turnagain Property.

3. Gravity Component

Complainant determined the appropriate penalty for each violation of the RRP Rule by considering the “nature,” “circumstance level,” and “extent category” of each violation. CX 96 at 17–19.

The RRP ERP categorizes the nature of each violation—i.e., the essential character of the violation—as either “chemical control” or “hazard assessment.” CX 96 at 16. Violations of a

chemical control nature are indicated by an “a” after the circumstance level in Appendix A and violations of a hazard assessment nature are indicted by a “b” after the circumstance level. *Id.* at 30. The RRP Rule 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.* at 16.

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). CX 96 at 17-18. “The greater the deviation from the regulations, the greater the likelihood that people will be uninformed about the hazards associated with lead-based paint and any renovations, that exposures will be inadequately controlled during renovations, or that residual hazards and exposures will persist after the renovation/abatement work is completed.” *Id.* at 17.

Here, Complainant relied on Appendix A to the RRP ERP to determine the circumstance level for each violation. *See* CX 96 at 30. According to Appendix A, the circumstance level for failure to obtain firm certification (violation 1) is 3a; for failure to ensure that the renovator certification requirements were met (violation 2) is 3a; for failure to post warning signs (violation 3) is 1b; and for failure to cover the ground with impermeable materials (violation 4) is 2a. *See* CX 96 at 32, 32, 30, and 34, respectively.

The extent category represents the degree, range, or scope of a violation’s potential for harm. CX 96 at 18. 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, significant, or minor impact on human health, with the greatest concern being for the

health of a child under 6 years of age and pregnant women in target housing. *Id.* When considering the extent category of a violation, the RRP ERP instructs Complainant to consider three determinable facts: the age of any children who occupy target housing; whether a pregnant woman occupies target housing; and whether a child or children under six had access to the child-occupied facility during renovations/abatement. *Id.* at 18–19

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. CX 96 at 18–19, Appendix B at 41. Here, Complainant had knowledge that there were no children under the age of 18 in the Turnagain Property during the renovation. Therefore, Complainant determined that the extent level for each of the violations is Minor. *Id.*

a. Violations 1, 2, and 4

For violations 1, 2, and 4, Complainant relied on Appendix B to the RRP ERP to determine the appropriate gravity-based penalty to propose for each violation. *See* CX 96 at 41. 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 (violations 1 and 2), the gravity-based penalty is \$4,500. CX 96 at 41. 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 (violation 4), the gravity-based penalty is \$6,000. CX 96 at 41. EPA then accounted for inflation by multiplying the total gravity-based penalty for each of the three violations noted herein by 1.08203, CX 98 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

b. Violation 3

Complainant treated violation 3 differently for the purposes of determining the appropriate gravity-based penalty. Rather than relying solely on the RRP ERP, Complainant also referred to the Section 1018 ERP. 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.

CX 98 at n. 30. Complainant determined that violation 3 is a circumstance level 1b, extent level minor violation. As such, the appropriate penalty for violation 3 is \$2,580. *See* CX 97 at 34 (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, Complainant then accounted for inflation by multiplying the gravity-based penalty by 1.64990, *see* CX 98 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 Complainant calculated for Respondent'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

4. Gravity-Based Adjustment Factors

After determining the appropriate inflation-adjusted gravity-based penalty, Complainant considered whether any additional factors warranted modifying the gravity-based penalty. *See* CX 96 at 19.

a. Ability to Pay

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires 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. 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." CX 96 at 22.

Here, Complainant analyzed all information available to it in order to determine whether Respondent had the ability to pay a civil penalty. *See* CX 75 to 78; CX 8 to 9. Based on that analysis, Complainant determined that Respondent would be able to pay such a penalty. In order to meet its burden to demonstrate an inability to pay a civil penalty, Respondent would have had to 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* CX 96 at 22-23. *See also*, CX 99 at 5.

Respondent has not submitted sufficient financial information from which EPA would be able to determine that Respondent is unable to pay a civil penalty. As such, Respondent has not met its burden to demonstrate an inability to pay all or a portion of the calculated civil penalty. CX 96 at 22. Therefore, Complainant did not adjust the penalty based on Respondent's ability to pay and effect on ability to continue in business.

b. History of Prior Violations

Complainant is unaware of any prior instances in which Respondent 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, Complainant did not adjust the penalty for this factor.

c. Degree of Culpability

The RRP ERP provides that the degree of culpability factor may be used to increase or decrease a gravity-based penalty. CX 96 at 20. Knowing or willful violations reflect an increased responsibility on the part of the violator and may give rise to criminal liability. *Id.* The culpability of the violator is reflected in the amount of the penalty which may be increased by up to 25 percent for this factor. *Id.* Here, Respondent had control over the events constituting the violations, had knowledge of the regulations, and knew the legal requirements it violated.

Therefore, Complainant determined that the following reasons justified a 25 percent increase of the gravity-based penalty due to Respondent's culpability.

Prior to the July 25, 2018 inspection, Complainant contacted Respondent numerous times via both letter and telephone calls to explain the RRP Rule requirements. *See* CX 80–85. Complainant advised Respondent that if it intended to work on pre-1978 residences and/or child occupied facilities, that it would need to obtain EPA firm certification and to assign a certified renovator for all jobs covered by the RRP Rule requirements. *See, e.g.*, CX 82, 85. Respondent acknowledged that it understood the RRP Rule requirements and what was required of it. Respondent was also invited to attend at least four in-person recordkeeping inspection with Complainant, so that Complainant's Inspectors could further explain the RRP Rule requirements. *See* CX 80-85, 92. But Respondent failed to show up for any of those inspections. *See* CX 05, 06, 83, 84.

On April 12, 2018, Ms. Tartaglia called Respondent and discussed the RRP Rule requirements with Mr. von Marees. CX 06 at 2. Mr. von Marees told Ms. Tartaglia that he understood the RRP Rule requirements. *Id.* Then on April 25, 2018, Complainant sent an advisory letter to Respondent as a follow up to the April 12, 2018 telephone conversation. CX 85. The letter reminded Respondent of the RRP Rule requirements and advised it to obtain EPA firm certification and renovator certifications prior to working on pre-1978 residential property. *Id.*

Despite these multiple warnings from Complainant, Respondent did not get EPA firm certified. So, on July 25, 2018, after Respondent informed Complainant that it would again be missing a scheduled in-person inspection, Complainant went to Respondent's job site and performed an unannounced worksite inspection. *See* CX 7. As part of that inspection, Ms.

Farnham had a detailed conversation with Mr. von Marees about Respondent's duties under the RRP Rule. CX 7.

Then on July 30, 2018, just five days after the July 25, 2018 inspection and before it obtained EPA firm certification, Respondent obtained another building permit at a pre-1978 target house—thereby offering or claiming to perform a renovation in target housing without EPA firm certification. CX 87, 88, 11. *See also* 40 C.F.R. § 745.81(a)(2)(ii) (no firm may perform, offer, or claim to perform renovations without EPA firm certification in target housing). This action, and Respondent's ongoing noncompliance despite repeated attempts by Complainant to help Respondent come into compliance with the RRP Rule, shows that Respondent disregarded the information provided to it by Ms. Farnham, Mr. Hamlet, and Ms. Tartaglia. Respondent disregarded Complainant's repeated warnings and continued to offer, perform, or claim to perform renovation work on pre-1978 residential properties.

Therefore, Complainant determined that a 25% upward adjustment to the gravity-based penalty was appropriate based on Respondent's culpability.

d. Other Factors as Justice May Require

The RRP ERP also allows EPA case teams to consider other factors as justice may require, which may arise on a case-by-case basis. CX 96 at 25. This factor allows Complainant to consider compelling circumstances that may not have been considered using the RRP ERP or unusual circumstances that suggest strict application of the RRP ERP is inappropriate. *Id.*

Here, Complainant 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.

* * *

Accordingly, based on a consideration of the nature, circumstances, extent, and gravity of the violations and, with respect to the Respondent, its 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 CX 96, Complainant respectfully offers that \$25,609 is an appropriate penalty for Respondent’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
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

III. CONCLUSION

This Court should find that \$25,609 is a reasonable penalty for Respondent’s four violations of TSCA and the RRP Rule. Such a penalty is reasonable based on the statutory factors established in section 16(a) of TSCA, 15 U.S.C. § 2615(a), and based on the RRP ERP. CX 96. Further, such a penalty appropriately accounts for the potential harm to human health and the environment that Respondent’s violations caused. Finally, as Respondent failed to meet its burden to establish that it cannot pay a penalty of \$25,609, this Court should not lower the penalty based on Respondent’s unsupported arguments.

Respectfully submitted,

Andrew Futerman,
Counsel for Complainant
EPA Region 10

ATTACHMENT 1

List of Acronyms (Alphabetically)

Acronym	Full Text
ATP	Ability to Pay
ECAD	EPA Region 10's Enforcement and Compliance Assurance Division
EPA	U.S. Environmental Protection Agency
EPS	Environmental Protection Specialist
ERP / ERPP	Enforcement Response and Penalty Policy
ESA	Expedited Settlement Agreement
LBP	Lead Based Paint
OECA	EPA's Office of Enforcement and Compliance Assurance
RRP	The Renovation, Repair, and Painting Rule, 40 C.F.R. Part 745, Subpart E
SEE	Senior Environmental Employment
TSCA	The Toxic Substances Control Act, 15 U.S.C. §§ 2601 to 2697

In the Matter of *GreenBuild Design & Construction, LLC*, Respondent.
Docket No. TSCA-10-2021-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Hearing Brief**, dated April 22, 2022 was served on the following parties in manner indicated below:

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1200 Pennsylvania Avenue, NW
Washington DC 20004

Copy by Electronic Mail to:
Mr. and Mrs. Rodrigo and Kari von Marees
GreenBuild Design & Construction, LLC
rad@greenbuild.us.com
kad@greenbuild.us.com
For Respondent

Dated: April 22, 2022
Chicago, Illinois

Respectfully submitted,

Andrew Futerman
Counsel for Complainant
EPA Region 10