UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

INITIAL DECISION

Before: Susan L. Biro
Chief Administrative Law Judge, EPA

Issued: December 12, 2022

Appearances:

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I. PROCEDURAL HISTORY

The Director of the Enforcement and Compliance Assurance Division ("Complainant") for the U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 10, initiated this action on December 2, 2020, when he issued a Complaint and Notice of Opportunity for Hearing ("Complaint") against GreenBuild Design and Construction, LLC ("GreenBuild" or "Respondent").[1] The Complaint alleges in four counts that GreenBuild committed violations of the "Renovation, Repair, and Painting Rule" ("RRP Rule"), codified at 40 C.F.R. Part 745, subpart E, in connection with renovation work it undertook at the residential property sited at 2208 Turnagain Parkway in Anchorage, Alaska ("Turnagain Property"). For these violations, the Complaint proposes penalties totaling $25,609.

Respondent filed an Answer to the Complaint ("Answer") on January 27, 2021. In the Answer, Respondent denied the violations and requested a hearing. Answer at ¶¶ 5.2, 6.1. On February 3, 2021, I was designated to preside over this case and issued a Prehearing Order establishing deadlines for the prehearing exchange of evidence and other preliminary requirements.

On June 23, 2021, Complainant submitted a Motion for Accelerated Decision as to Liability ("MAD"), to which Respondent filed a Response on July 23, 2021. I issued an Order on Complainant's Motion for Accelerated Decision as to Liability Order ("MAD Order") on November 17, 2021, granting the Motion. In the MAD Order, I found Respondent liable for:

(1) offering to perform, and then performing, a renovation at the Turnagain Property without being certified to do so under 40 C.F.R. § 745.89(a)(1) in violation of 40 C.F.R. § 745.81(a)(2)(ii), as alleged in Count 1 of the Complaint;

(2) failing to ensure that work at the Turnagain Property was directed by a certified renovator and performed by either a certified renovator or by individuals who had been trained by a certified renovator in violation of 40 C.F.R. §§ 745.81(a)(3) and 745.89(d)(1)–(2), as alleged in Count 2 of the Complaint;

(3) failing to post warning signs in accordance with the work standards outlined in 40 C.F.R. § 745.85 in violation of 40 C.F.R. § 745.89(d)(3), as alleged in Count 3 of the Complaint; and

(4) failing to cover the ground with impermeable material in accordance with the work standards outlined in 40 C.F.R. § 745.85(a)(2)(ii)(C) in violation of 40 C.F.R. § 745.89(d)(3), as alleged in Count 4 of the Complaint.

[1] The Administrator of the EPA delegated his authority to bring this action to the Regional Administrator for Region 10, who in turn delegated this authority to the Director of the Enforcement and Compliance Assurance Division for Region 10. Compl. at ¶ 1.2.

MAD at 15–20.

A Hearing Order was issued on January 10, 2022, setting certain prehearing deadlines for the parties and scheduling the hearing on the remaining issue of penalty. On February 15, 2022, Complainant filed a Motion to Compel Discovery, or in the Alternative, Motion in Limine ("Motion to Compel"). Therein, Complainant sought Respondent's production of documents concerning its claimed inability to pay the proposed penalty and remain in business or, in the alternative, an order prohibiting Respondent from raising the issue of the inability to pay at hearing. Mot. to Compel at 1 (citing, inter alia, Answer at ¶ 5.4). Complainant supported its Motion to Compel with correspondence evidencing its prior direct requests to Respondent for such financial documentation, in addition to the requirement for production set out in my Prehearing Order. Mot. to Compel at 2, Attach. A–C. Respondent did not file a response to the Motion to Compel, and on April 4, 2022, I issued an Order granting Complainant's request in the alternative and prohibiting Respondent from entering any evidence on its ability to pay at hearing ("Limine Order").

A hearing on the issue of penalty was conducted by videoconference on May 2 and 3, 2022.[2] Complainant introduced at hearing the testimony of two witnesses, Ms. Kim Farnham and Ms. Maria "Socky" Tartaglia. Tr. Vol. I at 19, 180. Respondent also presented the testimony of two witnesses, Mr. Rodrigo A. von Marees[3] and Mr. Paul Maple.[4] Tr. Vol. II at 125, 180. A total of 75 exhibits offered by Complainant were admitted into evidence: Complainant's Exhibits ("CX") numbers 1, 3, 4A, 6–12, 15–55, 59, 60, 76–78, 80–83, 85, 87–89, 94–98, 100–02, and 111–113. Tr. Vol. I at 40 (CX 4A); 44 (CX 1), 60 (CX 100), 63 (CX 101), 67 (CX 102), 87 (CX 89), 96 (CX 15–55), 112 (CX 7), 115 (CX 94), 119 (CX 8), 122 (CX 9), 124 (CX 11), 127 (CX 12), 129–30 (CX 59), 132 (CX 60), 185 (CX 3), 196–97 (CX 6), 199 (CX 95), 210 (CX 96), 214 (CX 97), 236 (CX 98); Tr. Vol. II at 17 (CX 85), 24 (CX 10), 48 (CX 80), 52 (CX 81), 57 (CX 82), 63 (CX 83), 67 (CX 87), 72–73 (CX 88), 81 (CX 76), 84 (CX 77), 88 (CX 78), 172–73 (CX 111–13).[5]

[2] The transcript of the hearing was produced in two separately numbered volumes, one for each day of hearing. On July 11, 2022, I granted the Complainant's Motion to Conform the Transcript. Citations to the transcript, as amended, appear herein as follows: "Tr. Vol. [I or II] at [page number]."

[3] Mr. von Marees also served as the Respondent's representative in this proceeding as permitted by 40 C.F.R. § 22.10. At Respondent's request, Spanish interpretation services were provided to Mr. von Marees throughout the hearing. Tr. Vol. I at 4-7, 149-150; Tr. Vol. II at 5-6. Mr. von Marees demonstrated an unfamiliarity with the sequential testimonial process at hearing; therefore, this Tribunal credits as "his testimony" all of his statements made at hearing and not merely those when he was explicitly testifying under oath as a witness in this proceeding.

[4] Mr. Maple testified via telephone. Tr. Vol. II at 179.

[5] The index of admitted exhibits included in the Transcript is incomplete and/or incorrect. Tr. Vol. I at 3 (erroneously omitting Complainant's admitted exhibits nos. 7-9, 11, 12, 59, 60, 94, 98); Tr. Vol. II at 3 (erroneously identifying CX 103 as admitted).

A Post-Hearing Scheduling Order and the transcript of the hearing were transmitted to the parties on May 24, 2022. Complainant submitted an unopposed Motion to Conform the Transcript, which was granted on July 11, 2022, and on July 8, 2022, Complainant timely filed its Post-Hearing Brief ("Brief" or "Br."). To date, Respondent has not filed any post-hearing brief. On August 11, 2022, Complainant filed a Notice indicating it would not be filing a reply brief, as Respondent had not filed any initial brief. With that Notice, the record closed.

II. PENALTY CRITERIA

The sole remaining issue in this proceeding is the determination of an appropriate penalty to assess for the violations for which Respondent was found liable. The assessment of civil administrative penalties in this matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45 ("Rules of Practice" or "Rules"). Section 22.27(b) of the Rules of Practice provides in pertinent part:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b).

Respondent was found to have committed violations of the RRP Rule, codified at 40 C.F.R § 745, subpart E. The RRP Rule was promulgated in 2008 under the Residential Lead-Based Paint Hazard Reduction Act of 1992 ("Act"). Pub. L. No. 102-550, Title X, 106 Stat. 3672 (1992) (codified in most relevant part at 15 U.S.C. §§ 2681 to 2692, and also in scattered sections of Titles 12 and 42 U.S.C.); CX 100 at 191–99. Subtitle B of the Act amended the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 *et seq.*, by adding to it Subchapter IV—Lead Exposure Reduction. Pub. L. No. 102-550, §1021, 106 Stat. 3672, 3912–3924 (codified at 15 U.S.C. §§ 2681 to 2692). CX 100 at 191. The Act states that "[i]t shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with any rule or order issued under this subchapter." 15 U.S.C. § 2689; CX 100 at 197–98. The RRP Rule provides that the "[f]ailure or refusal to comply with any provision of this subpart is a violation of TSCA section 409 (15 U.S.C. 2689)" and that "[v]iolators may be subject to civil and criminal sanctions pursuant to TSCA section 16 (15 U.S.C. 2615) for each violation." 40 C.F.R. § 745.87(a), (d).

In turn, TSCA section 16 provides as follows:

(1) Any person who violates a provision of section 2614 or 2689 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $37,500 for each such violation.[6] Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 or 2689 of this title.

. . .

(2)(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(1), (2)(B).

In August of 2010, EPA issued its "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule," and revised such policy on April 5, 2013 ("ERP"). CX 96.[7] The ERP sets out guidance for the Agency to use in determining the appropriate enforcement response and penalty amount for violations of TSCA Title IV. This policy, with minor exceptions, follows the penalty factors set forth in TSCA section 16, 15 U.S.C. § 2615(2)(B).

III. EVIDENCE PRESENTED BY THE PARTIES RELATED TO PENALTY

A. Complainant's Evidence

In support of the proposed penalty in this case, Complainant first offered the testimony of Kim Farnham as both a fact and an expert witness.[8] Tr. Vol. I at 22; *see also* CX 4A (Unsworn Statement of Kim Farnham in Support of Complainant's Prehearing Exchange).[9] Ms. Farnham holds a bachelor's degree in business management. Tr. Vol. I at 44; CX 1 at 2. For the past 11 years, she has been employed by EPA as an Environmental Protection Specialist assigned to the

[6] The maximum penalty per violation of the RRP Rule has since been revised upward to account for inflation and is now $43,611. *See* Civil Monetary Penalty Inflation Adjustment, 87 Fed. Reg. 1676, 1678 (Jan. 12, 2022).

[7] While the cover page of CX 96 is not explicitly marked as being the revised edition of the ERP, the document itself otherwise appears to be such, and includes appendices marked as "Revised – April 2013." CX 96 at 1, 30-42. The ERP, as revised on April 5, 2013, is publicly accessible at www.epa.gov/enforcement/revised-interim-final-consolidated-enforcement-response-and-penalty-policy-pre.

[8] Based upon her education and experience, Ms. Farnham was qualified at the hearing as an expert on lead-based paint and the RRP Rule. Tr. Vol. I at 52.

[9] While titled as "Unsworn," the document itself twice reflects that Ms. Farnham is making the statements therein "under penalty of perjury." CX 4A at 1, 9.

TSCA Lead-Based Paint Program. Tr. Vol. I at 23; CX 1 at 2; CX 4A at ¶¶ 1, 4. Ms. Farnham has received training on the RRP Rule requirements and lead-based paint risks and hazards. Tr. Vol. I at 45–46, 166–171; CX 1 at ¶ 7; CX 4A at 2. In addition, she trained to lead inspections. Tr. Vol. I at 47–48. Presently, she serves as a compliance officer and case developer, and she provides outreach and education to the general public and regulated community on the RRP Rule. Tr. Vol. I at 23–25; CX 1 at 2; CX 4A at ¶¶ 1, 2. More specifically, she leads RRP inspections, supervises other RRP inspectors, provides RRP inspector training, and is EPA's Region 10 TSCA RRP subject matter expert and RRP Rule program coordinator. Tr. Vol. I at 48–52; CX 1 at 2; CX 4A at ¶ 5. Ms. Farnham estimated that over the past 11 years she has conducted over 300 RRP inspections and worked on 50 enforcement cases for EPA. Tr. Vol. I at 51–52; CX 1 at 1; CX 4A at ¶ 6.

At hearing, Ms. Farnham described feeling a sense of passion for her work derived from knowing that "lead poisoning is totally preventable . . . if people are educated and . . . know[] about the dangers of lead paint." Tr. Vol. I at 32; *see also* CX 4A. Lead can into enter the human body via inhalation or ingestion, travel through the bloodstream, and be stored in the "organs, tissues, bones and teeth," she explained. Tr. Vol. I at 27. She proceeded to describe the serious consequences of lead exposure, particularly for the health of children, as it "can alter the chemical messengers that the body relies on to carry out proper immune function." Tr. Vol. I at 28. "At high levels, lead attacks the brain and central nervous system, causing coma, convulsions, and yes, even death."[10] Tr. Vol. I at 28, 54. Even in utero exposure is dangerous as pregnant persons can pass the lead in their bloodstream through the placenta into a baby's developing bones and other organs. Tr. Vol. I at 28. "High levels of lead can cause miscarriage and stillbirth. It can cause the baby to be born too early or too small." Tr. Vol. I at 28–29; *see also* CX 102 at 3–4.

Elaborating further, Ms. Farnham advised that even at lower levels, lead exposure can significantly affect a child's brain development, lowering IQ, attention spans, and educational attainment, and increasing antisocial behavior, as well as affecting reproductive organs and causing anemia, kidney damage, hearing and speech problems, and decreased bone and muscular growth. Tr. Vol. I at 28, 54. "No amount of lead in the system is safe for a child," she opined, and the negative effects of lead poisoning are permanent. Tr. Vol. I at 55. Unfortunately, lead poisoning can sometimes be difficult to diagnose because, as Ms. Farnham testified, the symptoms of lead poisoning are the same as those of the flu. That is, a person will look pale and suffer from headaches, stomachaches, emesis, appetite and weight loss, muscle and joint weakness, and lethargy. Tr. Vol. I at 29. Thus, an elevated blood lead level test is the only way to determine if a person is suffering from lead poisoning. Tr. Vol. I at 27.

[10] The volume of leaded products to which a person is exposed is less significant that the percentage of lead in the product itself, Ms. Farnham opined. Tr. Vol. I at 31. "If a child happens to swallow a piece of jewelry that is 99 percent lead, it will kill that child within two weeks . . . . And if a child eats paint chips that's 35 percent lead . . . it's very fatal to the child. The child will die." Tr. Vol. I at 31.

Upon finding that there were many children moving into pre-1978 properties with lead-based paint[11] and that exposure to such paint posed a danger to children, Congress passed the Residential Lead-Based Paint Hazard Reduction Act in 1992, Ms. Farnham informed. Tr. Vol. I at 61. The Act assumes that lead is present in all homes built before 1978. Tr. Vol. I at 68. The Act required EPA to establish regulations to protect children from exposure to lead-based paint in this housing, known as "target" housing. Tr. Vol. I at 61. Pursuant to this mandate, EPA promulgated the RRP Rule (CX 102).[12] Tr. Vol. I at 61–62.

"[T]he whole purpose of the RRP Rule is to protect the general public, to protect the [renovation] workers, and especially to protect the family members that may actually be living in that house . . . especially the children under the age of 6 from possibly getting lead poisoned" from the renovation process, Ms. Farnham declared. Tr. Vol. I at 54; *see also* Tr. Vol. I at 61, 68, 107, 136. Exposure to lead can occur as a result of a contractor engaging in dry sanding, scraping, or cutting lead painted building components, creating lead dust and debris. Tr. Vol. I at 55, 57. As such, among other provisions, the RRP Rule requires all firms conducting renovations on pre-1978 residential properties to be certified and to assign a certified renovator to supervise the job. Tr. Vol. I at 53, 69. The certified renovator is required to make a determination regarding the presence of lead-based paint and, unless no such paint is found, comply with recordkeeping, containment, and safe work practice standards during the renovation. Tr. Vol. I at 53, 69. With regard to containment, the RRP Rule mandates that "any contractor working on a pre-1978 property must contain the work site," meaning that "they have to have signage"; "[t]hey have to have tape around the work site"; and "[t]hey have to lay down plastic . . . to contain the debris, the paint chips from getting onto the bare ground, getting onto the floor . . . on the interior." Tr. Vol. I at 56. Like the Act, the RRP Rule presumes that pre-1978 properties are "positive for lead unless the certified renovator has made a determination that there is no lead present." Tr. Vol. I at 108.

As to her work, Ms. Farnham testified that she is based out of the Region 10 office of EPA in Seattle but that she travels for a week at a time to conduct regional RRP inspections.[13] Tr. Vol. I at 73–74. Prior to undertaking such an inspection trip, Ms. Farnham and her co-inspector, EPA senior employee Rob Hamlet, review residential building permits pulled for pre-1978 properties in the area to be inspected. Tr. Vol. I at 70–71, 73–74; CX 4A at ¶ 13. Then, they check whether the contractors on the permits are certified renovators and, if they are not,

[11] In 1978, lead-based paint was declared a hazardous product, and further manufacture of it in the United States was prohibited. Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 42 Fed. Reg. 44,192 (Sept. 1, 1977) (codified at 16 C.F.R. Pt. 1303).

[12] Ms. Farnham testified that in addition to the RRP Rule, EPA also promulgated a pre-education regulation (CX 101) mandating that companies performing renovation work on pre-1978 properties "must provide education to the property owner and/or to the tenants that live in that pre-1978 property before the contractor or the company starts renovation work." Tr. Vol. I at 64; CX 101.

[13] Region 10 of EPA covers the Pacific Northwest, including the states of Alaska, Idaho, Oregon, and Washington. CX 4A at ¶ 10.

designate them for a record-keeping inspection. Tr. Vol. I at 71; CX 4A at ¶ 14. Ms. Farnham noted that they advise the contractor of the time and place of inspection by sending a written "notice of inspection" and follow up to confirm the notice was received, all in an effort to avoid renovators not appearing for the inspection and wasting government resources. Tr. Vol. I at 74–76; CX 4A at ¶ 15. On occasion, Ms. Farnham elaborated, they also do "drive-bys," that is, unannounced inspections of work sites where a construction permit on target property was issued to a non-certified renovator. Tr. Vol. I at 76–77; CX 4A at ¶ 21.

During her recordkeeping inspections, Ms. Farnham asserted, she always follows a similar script and tries to maintain a friendly demeanor. Tr. Vol. I at 158–60; CX 4A at ¶ 25. Specifically, she asks the contractor in charge to show her its RRP Rule records, including the firm certification, the renovator certification, and the determination made as to the presence of lead-based paint. CX 4A at ¶ 37. If the records are not available on site, she requests that the contractor subsequently submit them to her. Tr. Vol. I at 116–17. Further, during and after the inspection, she provides the contractor with information on the RRP Rule requirements, including the mandated certifications. Tr. Vol. I at 158; CX 4A at ¶¶ 44, 47. EPA's RRP Rule inspectors lack the authority to adjudge regulatory violations and assign penalties, and cannot issue field warnings or field citations, she explained. Tr. Vol. I at 139–140, 141, 158–59, 172–73; CX 4A at ¶ 43. Rather, only EPA "case developers" are authorized to determine whether an RRP Rule violation has occurred and calculate the appropriate penalty. Tr. Vol. I at 172–73.

As to Respondent specifically, Ms. Farnham testified that the company first came to her attention in July of 2018, when she was planning a recordkeeping inspection trip to Alaska. Tr. Vol. I at 69, 76; CX 4A at ¶¶ 56–60. At that time, she noted that Respondent had pulled a permit to renovate the Turnagain Property. Tr. Vol. I at 77; CX 4A at ¶ 57; CX 10. Mr. Hamlet advised her that other inspectors had unsuccessfully tried to get the company to come to a records inspection on earlier occasions. Tr. Vol. I at 72–73; CX 4A at ¶ 60. Consequently, on July 25, 2018, after arriving in Alaska, she and Mr. Hamlet did a "drive-by" at the Turnagain Property. Tr. Vol. I at 77, 82; CX 4A at ¶¶ 62–63; CX 7 at 2. Upon doing so, they observed a truck adjacent to the property displaying Respondent's name and logo. CX 4A at ¶ 65; CX 17, 18, 24. They also heard and witnessed workmen engaged in "active pressure washing going on in the back of the house." Tr. Vol. I at 78–79, 89–90, 93, 98–100, 143–44, 160, 163; CX 4A at ¶¶ 64, 66, 74; CX 17, 22, 42, 103; CX 7 at 6. Given the activity occuring, the inspectors decided to conduct an inspection at that time. Tr. Vol. I at 78.

As they approached the Turnagain Property, Ms. Farnham recalled, a workman identified Mr. von Marees as the contractor in charge. Tr. Vol. I at 160–161. The inspectors then introduced themselves to Mr. von Marees and presented to him a notice of inspection (CX 89). CX 4A at ¶ 69; CX 7 at 2. In response, Mr. von Marees identified himself as the owner of GreenBuild, and he signed the notice. Tr. Vol. I at 79–82; CX 4A at ¶ 70. Ms. Farnham then proceeded with the inspection, discussing with Mr. von Marees the RRP Rule and the required certifications, recordkeeping procedures, work practice standards, and lead paint determinations. Tr. Vol. I at 88; CX 4A at ¶ 78–80; CX 7 at 2, 4. Ms. Farnham testified that she and Mr. von

Marees conversed in English and that she had no difficulty communicating with Mr. von Marees. Tr. Vol. I at 171–72; *see also* CX 94 (Farnham Inspection Field Notes). She recalled Mr. von Marees being receptive in that he acknowledged lacking the necessary certifications and inquired as to how to become certified. Tr. Vol. I at 88–89; CX 4A at ¶ 81; CX 7 at 4, 5.

Ms. Farnham testified that after concluding her discussion with Mr. von Marees, she walked around the Turnagain Property. Tr. Vol. I at 90. She personally observed, among other things, ongoing pressure washing of the exterior of the house, missing paint from the white painted wood fascia,[14] along with white paint chips in multiple places on the bare ground near the building's foundation, and the absence of both plastic sheeting to contain the paint chips and debris and signage as required by the RRP Rule. Tr. Vol. I at 90–91, 93, 100–04, 106–07, 157; *see also* CX 4A at ¶¶ 74–77; CX 7 at 6, 8–11; CX 22 (photograph of a worker pressure washing the white fascia and soffit on what appears to be the side of the property); CX 42 (photograph of a worker directing a pressure washer at what appears to be the back of the house); CX 26–30, 53 (photographs showing water stream above the back of the house); CX 37–38, 47–48 (photographs of a wet window, board, and floors adjacent to what appears to be the front house door); CX 43–45 (photographs showing the removal of the wood fascia's white paint); CX 35–36, 39–40, 46, 49, 52 (photographs of white paint chips on bare ground)); CX 94 at 3. Ms. Farnham testified that the series of photographs presented at the hearing (CX 15–55) accurately represented the conditions at the Turnagain Property that she personally witnessed at the time of the inspection, Tr. Vol. I at 92–94, and that the photographs were taken, with the implicit consent of Mr. von Marees, by Mr. Hamlet while she was conversing with Mr. von Marees. Tr. Vol. I at 87; CX 4A at ¶ 72.

After the July 2018 inspection, Ms. Farnham recalled that she promptly followed up with Mr. von Marees by email, sending him written information on the RRP Rule and requesting that he provide her with evidence of his certifications acquired post-inspection, as well as various other records. Tr. Vol. I at 112–13, 123, 125–27, 139, 145, 158; CX 4A at ¶¶ 83–84; CX 11, 12. Eventually, Mr. von Marees provided her with the requested documents, and on January 27, 2019, Ms. Farnham finalized her inspection report on Respondent and the Turnagain Property (CX 7). Tr. Vol. I at 109–111, 116.

Complainant's second witness was Maria "Socky" Tartaglia, who has been employed by EPA for many years and currently serves as an Environmental Protection Specialist and TSCA Lead-Based Paint Enforcement and Compliance Officer.[15] Tr. Vol. I at 180–183; CX 3 at 2; CX 6 at ¶¶ 1–3. Like Ms. Farnham, Ms. Tartaglia has undertaken various trainings related to her position, including EPA lead inspector training and renovator training. Tr. Vol. I at 186–88; CX

[14] "Fascia," or "fascia board," is the "horizontal piece (such as a board) covering the joint between the top of a wall and the projecting eaves." *Merriam-Webster.com Dictionary*, MERRIAM-WEBSTER, www.merriam-webster.com /dictionary/fascia (last visited 22 Nov. 2022); *see also* Tr. Vol. II at 167-68.

[15] At hearing, Ms. Tartaglia explicitly adopted and endorsed the statements made in her "Unsworn Statement" introduced into evidence as CX 6. Tr. Vol. I at 192-96.

3 at 2. Ms. Tartaglia also testified that her current position involves both programmatic and enforcement work. Tr. Vol. I at 188; *see also* CX 3 at 2. On the program side, she performs outreach to educate the public and the regulated community, such as building contractors, about the RRP Rule requirements, including responding to inquiries and participating in "home shows," or "exhibit event[s] for builders and contractors that like to show off their work" to the general public. Tr. Vol. I at 189–90; CX 3 at 2. She said that the goal of her team is to educate the general public about the RRP Rule requirements such that a member of the public looking to hire a contractor to perform remodeling work on a pre-1978 home ensures that the contractor is certified. Tr. Vol. I at 189–90. She testified that she also works with EPA's public affairs office to send messages about the RRP Rule through social media. Tr. Vol. I at 191–92.

Ms. Tartaglia offered a brief general overview of procedures employed by her office in an RRP Rule enforcement case. Tr. Vol. I at 201. She explained that once an RRP Rule inspection is completed, the inspector puts together a "case file" containing all of the information collected on the contractor. Tr. Vol. I at 201. The case file is then transmitted to her, as the "case developer," for review and compliance analysis. Tr. Vol. I at 201; CX 6 at ¶ 4; *see also* CX 3 at 1 (Ms. Tartaglia's CV representing that she has "[r]eviewed over 200 [RRP Rule] Inspection Reports over 6 years"). As the case developer, Ms. Tartaglia's specific responsibility is to determine whether the case file evidences RRP Rule violations. Tr. Vol. I at 202; Tr. Vol. II at 26; CX 3 at 2; CX 6 at ¶¶ 4–5. If the case file does not reflect any such violations, the case is closed. Tr. Vol. I at 204. In turn, if Ms. Tartaglia finds only a "recordkeeping violation," such as the lack of a firm or renovator certification, she employs the Agency's expedited settlement agreement policy for the appropriate resolution. Tr. Vol. I at 203, 205–06. Specifically, she explained, where there is "a first-time violator, and it's a minor violation . . . we give them an opportunity to come into compliance with the RRP Rule," and issue "an advisory letter or a notice of non-compliance."[16] Tr. Vol. I at 204–05.

Where, however, the case file reflects a "work practice standard violation," then Ms. Tartaglia proceeds with initiating a full penalty enforcement action. Tr. Vol. I at 203, 205–06. To calculate the proposed penalty, she draws the relevant facts from the inspection report, including photographs taken of the work site, as well as background information gathered on the violator, such as its prior interactions with EPA. Tr. Vol. I at 215–16. Ms. Tartaglia testified that for the penalty calculation methodology, she follows the ERP (CX 96) and the Section 1018 Disclosure Rule Enforcement Response and Penalty Policy ("Section 1018 ERP") (CX 97), as

[16] EPA's Lead-Based Paint Expedited Settlement Agreement Policy (Aug. 19, 2015) ("ESA Policy") is publicly accessible at www.epa.gov/sites/default/files/2020-10/documents/lbpesapolicy081915.pdf. The ESA Policy allows for the Agency to offer reduced penalties in a limited subset of RRP Rule violation cases where *all* of the individual violations found fall within the Policy. ESA Policy at 1-2. Explicitly excluded from its coverage are violations of work practice standards. ESA Policy at 3.

well as a January 15, 2020 EPA memorandum ("EPA Memo") directing how inflation is to be accounted for in penalty calculations (CX 98).[17] Tr. Vol. I at 207–213, 234; CX 6 at 4.

As to Respondent, Ms. Tartaglia recalled the company first coming to her attention in April of 2018, when Mr. Hamlet advised her that Respondent had not appeared for a noticed inspection in October of 2017. Tr. Vol. II at 8, 10–11; CX 6 at ¶ 7. In response, she called Respondent on April 12, 2018, and spoke with Mr. von Marees. Tr. Vol. II at 8, 11, 13; CX 6 at ¶ 8. She advised Mr. von Marees of her concerns regarding the missed inspection meeting with the Agency and the fact that he had pulled a building permit on a pre-1978 home when he was not RRP Rule certified. Tr. Vol. II at 12; CX 6 at ¶ 8. She also counseled him "in depth about the RRP Rule requirements" and warned "that he needed to be firm- and renovator-certified before he could work on a pre-1978 home." Tr. Vol. II at 12; *see also* CX 6 at ¶¶ 8, 9. Although the conversation was conducted in English, Ms. Tartaglia felt confident that Mr. von Marees understood her based upon his appropriate responses in English. Tr. Vol. II at 12–13, 120. He represented to Ms. Tartaglia that he understood the RRP Rule requirements and would no longer work on target housing. CX 6 at ¶10.

Ms. Tartaglia followed up that conversation by sending Mr. von Marees an "advisory letter" dated April 25, 2018, in which she summarized their conversation and restated the RRP Rule requirements that prohibit renovations of target housing without certification. Tr. Vol. II at 13–15, 17, 19; CX 6 at ¶¶ 11–13; CX 85. In the advisory letter, Ms. Tartaglia explicitly identified a series of building permits that Respondent had obtained for pre-1978 properties when neither Respondent nor Mr. von Marees was certified to renovate such housing. Tr. Vol. II at 17–18; CX 85. She also included information on how to become firm- and renovator-certified and advised that "violations of the RRP [R]ule will result [in] civil penalties up to $37,500 per violation." Tr. Vol. II at 18–19; CX 6 at ¶ 12; CX 85.

Ms. Tartaglia's next encounter with Respondent again occurred via telephone a few months later on July 25, 2018. Tr. Vol. II at 20; CX 6 at ¶ 14. She recalled Mr. Hamlet calling her to request that she reach out to Respondent as the company had failed to respond to either Mr. Hamlet's email or telephone call attempting to confirm the inspection scheduled with it for the following day, July 26, 2018. Tr. Vol. II at 20–21; CX 6 at ¶¶ 15–18. Ms. Tartaglia stated that, in response, she again telephoned Mr. von Marees and inquired if he was available to attend the July 26 inspection. Tr. Vol. II at 21–22; CX 6 at ¶ 18. Mr. von Marees responded to her that he was not available and asked to reschedule. Tr. Vol. II at 21–22; CX 6 at ¶ 18. Ms. Tartaglia noted that later that same day on July 25, 2018, the EPA inspectors got "lucky" and found Respondent working at the Turnagain Property, for which it had previously pulled a building permit. Tr. Vol. II at 22–23, 25; CX 10.

[17] Ms. Tartaglia testified that her findings regarding violations are reviewed by her team leader. Tr. Vol. I at 203. Likewise, her CV indicates that her preparation of a full penalty enforcement action involves the submission of "a comprehensive case development memo to refer to [the] Office of Regional Counsel." CX 3 at 2.

Consistent with the normal case development process, after EPA's inspection of Respondent at the Turnagain Property, Ms. Tartaglia said that she reviewed the contents of the case file, including the inspection report (CX 7), photographs (CX 15–55), building permit (CX 10), and business license. Tr. Vol. II at 26–27; CX 6 at ¶ 20; CX 7. Based upon her review, she concluded that Respondent had committed four RRP Rule violations. Tr. Vol. II at 27–28; CX 6 at ¶¶ 21–22, 26. Further, since two of the violations involved work practice standards, she made the determination that "this was going to be a full penalty action case." Tr. Vol. II at 29. Ms. Tartaglia explained that because there had been a formal inspection, and the inspectors had observed the violations, there was no possibility of issuing a warning instead of pursuing a penalty enforcement action in this case. Tr. Vol. II at 29; *see also* CX 6 at ¶ 23.

At hearing, Ms. Tartaglia detailed her mathematical calculations of the proposed appropriate monetary penalty for Respondent's RRP Rule violations utilizing the ERP (CX 96). As background, she explained that the ERP penalty calculation methodology consists of multiple stages, with the first stage involving a determination of the gravity-based penalty amount by considering the nature, circumstance, and extent of the given violation. Tr. Vol. I at 217, 221; CX 6 at ¶ 29. "The nature of the violation is typically the character of the violation," of which there are two types: "chemical control" and "hazard assessment." Tr. Vol. I at 221–22. Ms. Tartaglia explained that the former type is most common for RRP Rule violations "[b]ecause these violations could have been handled -- if the renovator was certified, they could have controlled those violations, to minimize exposure to lead." Tr. Vol. I at 222.

As for the "circumstance of a violation," Ms. Tartaglia asserted that it represents the probability of a violation causing harm to human health and the environment. Tr. Vol. I at 222. The ERP breaks down the circumstance of a violation into six levels, with level one being the highest and level six being the lowest. Tr. Vol. I at 222; CX 96 at 17. As Ms. Tartaglia explained:

> [I]f it's level 1 and 2, that means a violation -- has a high probability of harming human health and the environment. And for violations under level 3 and 4, there is a medium probability of impacting human health and the environment. And for levels 5 and 6, there is a low probability of impacting human health and the environment.

Tr. Vol. I at 223–24; *see also* CX 96 at 17. Ms. Tartaglia noted that the ERP's Appendix A definitively establishes the circumstance level for each type of possible RRP violation. Tr. Vol. I at 227; CX 96 at 30; CX 6 at ¶ 30.

The extent of a violation, Ms. Tartaglia continued, "means the degree of a violation that impacts the human health and the environment." Tr. Vol. I at 224. With respect to a violation's extent, the ERP differentiates between three categories: major, significant, and minor. Tr. Vol. I at 224; CX 6 at ¶ 31. A "major" violation risks "serious potential damage to human health and the environment." Tr. Vol. I at 224. A "significant" violation means that "there's a potential for

significant damage to human health and to the environment, while a "minor" violation means that "there's a potential for lesser amount of damage to human health and to the environment." Tr. Vol. I at 225; *see also* CX 96 at 18. The facts considered in determining the extent of a violation are the age of the children living in the target housing; if there are any pregnant women living in the target housing; and "if there were any children that have access to a child-occupied facility." Tr. Vol. I at 225–26; *see also* Tr. Vol. I at 231; CX 96 at 18. The ERP focuses on the presence of children, Ms. Tartaglia said, because "[t]hey are the ones that are vulnerable to lead-based paint, high levels of lead-based paint. Exposure of lead-based paint can make a child sick . . . and they can become lead poisoned from it." Tr. Vol. I at 226. Appendix B of the ERP definitively decrees the extent level of violations based upon the presence or absence of children and pregnant women in the housing. Tr. Vol. I at 230; CX 96 at 40; CX 6 at ¶ 31. The ERP also provides a matrix establishing a preliminary "gravity-based penalty" amount based upon the nature, circumstance, and extent of a violation. Tr. Vol. I at 232; CX 96 at 41.

To complete the first stage of a penalty calculation, Ms. Tartaglia indicated, she is next obliged to increase the gravity-based penalty amount for most, but not all, RRP Rule violations using the "inflation multiplier" as set forth in Table A of the EPA Memo (CX 98). Tr. Vol. I at 233, 236–37, 250; CX 98 at 14; CX 6 at ¶ 36–37. For the rest of the violations, a footnote in the EPA Memo instructs that an alternative inflation adjustment factor set forth in the Section 1018 ERP should be applied. Tr. Vol. I at 250; CX 6 at ¶ 41–42; CX 98 at 34, n. 30. Once this inflation multiplier is calculated and added in, Ms. Tartaglia explained, she has determined the final gravity-based penalty amount for each individual violation. Tr. Vol. I at 232.

Turning to the next stage of an ERP penalty calculation, Ms. Tartaglia averred that it provides for the upward or downward adjustment of that gravity-based penalty amount based upon the violator's individual degree of culpability, ability to pay or continue in business, and history of prior violations, as well as for "other matters as justice may require." Tr. Vol. I at 221, 237–38; CX 96 at 19–20. The degree of culpability factor allows a 25 percent upward or downward adjustment based upon a respondent's knowledge of the RRP Rule requirements and their degree of control over the events underlying the violation. Tr. Vol. I at 239–40; CX 96 at 19–20. The history of violations factor looks at whether a formal enforcement action has ever been brought against the respondent before, including "a consent agreement . . ., a final order, judicial decision, or a criminal conviction." Tr. Vol. I at 240. In order to be considered, Ms. Tartaglia advised, there must have been a formal enforcement action, not merely prior communications between the agency and the respondent. Tr. Vol. I at 240–41.

As for a respondent's ability to pay or continue in business, Ms. Tartaglia explained that that factor evaluates whether the violator has the ability to pay the proposed penalty as it is never EPA's intent to deliberately put a company out of business. Tr. Vol. I at 241–42. To make this assessment, she consults publicly available financial information on the respondent by obtaining reports from such research entities as Westlaw and Dun & Bradstreet. Tr. Vol. I at 242–43.

Ms. Tartaglia explained that the last adjustment factor consisting of "other matters as justice may require" offers flexibility to adjust the penalty downward "[i]f something comes up." Tr. Vol. I at 244; CX 96 at 25. For example, under this factor, the penalty may be reduced based upon such "special circumstances" as the violator voluntarily disclosing its violation and coming into compliance; exhibiting a cooperative attitude during the "whole process," including showing good faith in complying with the RRP Rule; and/or settling before the prehearing exchange process. Tr. Vol. I at 244–47; CX 96 at 25-26. Once she completes this second stage of the penalty calculation, Ms. Tartaglia explained, she memorializes her calculations in a "compliance analysis and penalty calculation memo." Tr. Vol. I at 247–48.

Ms. Tartaglia next described her ERP penalty calculations with regard to GreenBuild's four violations.[18] Tr. Vol. I at 197–99; CX 6 at 4; Tr. Vol. II at 30; *see generally*, CX 95 (Penalty Calculation Summary). First, she looked to the ERP to determine the "nature" of the violations, finding the nature of the first, second, and fourth violations (lack of firm certification, renovator certification, and plastic sheeting) to be "chemical control" (designated by an "a") and the nature of the third violation (failure to post warning signs) to be "hazard assessment" (designated by a "b"). Tr. Vol. II at 31–32. Second, she determined the "circumstance" level of the violations using ERP Appendix A. Tr. Vol. II at 32–33; CX 6 at ¶ 30; CX 96 at 30. Appendix A indicated that the first and second violations involving the lack of certifications were circumstance level "3a"; the third violation involving the failure to post warning signs was circumstance level "1b;" and the fourth violation involving the lack of plastic sheeting was circumstance level "2a." Tr. Vol. II at 33–35; CX 6 at ¶ 32. Third, she looked at ERP Appendix B and determined the "extent" level for each violation to be "minor," as neither a pregnant person nor a child occupied or had access to the premises. Tr. Vol. II at 35–37; CX 6 at ¶¶ 32, 43. Next, applying these three factors to the penalty matrix in Appendix B of the ERP, she concluded that $4,500 was the appropriate gravity-based penalty for the first and second violations, respectively, and that $6,000 was the appropriate gravity-based penalty for the fourth violation. Tr. Vol. II at 37–38; CX 6 at ¶¶ 33–34. Then, she multiplied those three gravity-based penalties by the inflation multiplier of 1.08203, set out in the EPA Memo, and added that amount to the penalties.[19] Tr. Vol. II at 38–39; CX 6 at ¶¶ 36–40; CX 98. As to the third violation, which she found to have a circumstance level of "b" rather than "a," Ms. Tartaglia followed the

[18] Prior to undertaking her gravity-based penalty analysis, Ms. Tartaglia testified that she determined how many "independently assessable" violations Respondent had committed and whether Respondent realized any "economic benefit" from the violations prior to calculating the gravity-based penalty under the ERP. CX 6 at ¶¶ 25-28; Tr. Vol. II at 30-31. She identified four violations to be independently assessable and the economic benefit to Respondent therefrom to be "negligible," that is, less than the maximum penalty amount to be considered, so she did not include it in her penalty calculations. CX 6 at ¶¶ 26, 28; Tr. Vol. II at 117-18.

[19] The 2020 EPA Memo that Ms. Tartaglia relied upon for her calculations (CX 98) was superseded by a January 12, 2022 Memorandum on "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," (2022 Memo), which is publicly accessible at www.epa.gov/system/files/documents/2022-01/2022amendmentstopenaltypoliciesfor inflation_0.pdf. The 2022 Memo increases the adjustment factors to account for inflation. In this case, Complainant has not alleged that the 2022 Memo applies nor requested a higher penalty based upon the 2022 inflation adjustment factors.

footnote in the EPA Memo and utilized the matrix in the Section 1018 ERP. Tr. Vol. II at 39–40; CX 6 at ¶ 41–42; CX 97 at 34. From that matrix, she concluded that $2,580 was the appropriate gravity-based penalty for the third violation. Tr. Vol. II at 40; CX 6 at ¶ 44; CX 97 at 34. She then adjusted this figure by adding to it to the sum of the application of the alternative inflation multiplier used for such violations (1.64990). Tr. Vol. II at 40; CX 6 at ¶ 46: CX 98 at 14. The total for these four gravity-based penalties amounted to $20,487. Tr. Vol. II at 42; CX 6 at ¶ 47.

After completing this mathematical analysis, Ms. Tartaglia proceeded to the second stage of the ERP, adjusting the gravity-based penalty. Tr. Vol. II at 43; CX 6 at ¶ 48. As to the culpability factor, Ms. Tartaglia determined that an upward adjustment of 25 percent, the maximum percentage permitted under the ERP, was warranted because of the "overwhelming evidence showing the number of times that EPA reached out to him [Mr. von Marees] to come into compliance with the RRP Rule," going back to 2015. Tr. Vol. II at 44; *see also* Tr. Vol. II at 58, 75–76; CX 6 at ¶¶ 58–61. Specifically, she considered that EPA had unsuccessfully attempted to schedule in-person inspections with Respondent three times, each time sending him a notice of inspection letter describing the RRP Rule requirements, followed by a telephone call. Tr. Vol. II at 44–49, 53–55, 58, 63–64; CX 6 ¶ 59; CX 80–83, 85. She noted that these notices were issued in direct response to Respondent pulling building permits on pre-1978 homes. Tr. Vol. II at 53; 64–65, 68–69; CX 87; CX 88. She further considered that Respondent was aware of the RRP Rule requirements to be firm- and renovator-certified prior to the July 2018 inspection at the Turnagain Property. Tr. Vol. II at 64. Finally, she noted that Respondent had violated the RRP Rule yet again, just five days after the July 2018, by pulling another permit on target housing when it was not yet certified to perform renovation work on such a property. Tr. Vol. II at 73–75 (noting that Respondent became firm-certified in mid-August 2018), 77; CX 6 at ¶ 59(e); CX 87.

Because there had been no prior formal enforcement action taken against Respondent, Ms. Tartaglia found no history of violations and made no adjustment based on that factor. Tr. Vol. II at 76–77; CX 6 at ¶¶ 54–55.

She next considered Respondent's ability to pay or continue in business, utilizing three reports of publicly accessible financial information on the company, as well as the contract and invoice for the work Respondent performed at the Turnagain Property (CX 8). Tr. Vol. II at 78–79, 84–85, 86, 92–93; CX 6 at ¶¶ 49–50; CX 76–78. Based upon those records, she determined that Respondent had the ability to pay the proposed penalty she had calculated and made no downward adjustment on that basis. Tr. Vol. II at 88–89, 91, 99; CX 6 at ¶¶ 52–53. She noted that the reports reflected Respondent as having $108,000 in annual sales. Tr. Vol. II at 88–89; CX 6 at ¶ 50; CX 76 at 1; CX 77 at 4. The Turnagain Property contract (CX 8) and invoice (CX 9) evidenced that Respondent had been paid $114,917.52 for its work on the Property and was still owed $13,662.48. Tr. Vol. II 92–95; CX 6 at ¶ 51; CX 8, 9. Ms. Tartaglia testified that those figures, while not representing the profit that Respondent earned from its work at the Turnagain Property, still reflected that Mr. von Marees "receiv[ed] some of the money into . . .

his own pocket." Tr. Vol. II at 97–98. Further, she concluded that Respondent was working regularly based upon the building permits it was pulling. Tr. Vol. II at 97–99; CX 59; CX 60. Ms. Tartaglia represented that she would have reconsidered her conclusion that Respondent possessed the ability to pay the proposed penalty had it ever provided additional financial information. Tr. Vol. II 99–100; CX 6 at 7.

As the final step in her calculations, Ms. Tartaglia concluded from the case file that no adjustment on the basis of attitude or otherwise, under "other factors as justice may require," was warranted in this case. Tr. Vol. II at 101–02; CX 6 at ¶¶ 62–72. Therefore, based upon her penalty calculations, Ms. Tartaglia determined that the appropriate penalty for Respondent's four RRP Rule violations was $25,609. Tr. Vol. II at 102–03; CX 6 at ¶¶ 73–76. She opined that that figure represented a fair and reasonable penalty, stating that EPA takes violations of the RRP Rule seriously as lead "is toxic, it's dangerous, and any exposure to lead-based paint can cause serious damage to a person's health." Tr. Vol. II at 107; *see also* CX 6 at ¶ 77. She continued, "[T]he RRP rule was created to protect human life, especially young children, from becoming lead poison[ed]." Tr. Vol. II at 107. Abiding by the requirements of the RRP Rule, Ms. Tartaglia testified, "reduces the health risk associated with lead and any lead poisoning for the contractors, the homeowners, [and] their families, especially children under the age of six." Tr. Vol II. at 107. She further testified that Respondent was "out of compliance with the RRP Rule," suggesting that Mr. von Marees was unaware of the need to protect himself, his workers, his customers, and their families from becoming lead poisoned. Tr. Vol II. at 108. Finally, she noted that the Agency had imposed penalties on other renovators and real estate developers in Anchorage, Alaska. Tr. Vol. II at 117.

B. Respondent's Evidence

At hearing, Mr. von Marees and Mr. Paul Maple offered their sworn testimony on GreenBuild's behalf regarding an appropriate penalty for the violations for which Respondent was found liable. Tr. Vol. II at 125, 180.

As background, Mr. von Marees explained that he was born and raised in Chile, where he trained as a mechanical engineer. Tr. Vol. I at 10; Tr. Vol. II at 148. Believing in "the American dream," he immigrated to the United States intending "to work hard" and "build my company."[20] Tr. Vol. I at 9–10. In 2003, he started a flooring company called "Perfect Floor," and in 2007, he and his wife, Carrie,[21] who is American, founded GreenBuild.[22] Tr. Vol. I at 9; Tr. Vol. II at

[20] Mr. von Marees averred that he obtained United States citizenship in 2016 and at that time legally changed his surname from "Diaz" to "von Marees." Tr. Vol. II at 57; *see also* Tr. Vol. II at 49, 125-26. His former name appears on a number of the exhibits in this case. *See, e.g.*, CX 82, 83.

[21] The spelling of her name in the record appears variously as "Carrie" and "Kari."

[22] Mr. von Marees described his wife as a "very intelligent," "very smart woman that went to MIT" to study "[s]omething with aerospace," whose "classmates are astronauts," and indicated that his wife drafted the documents

126, 145–46, 155–56. GreenBuild is a very small construction company in Anchorage, Alaska, with only two employees, Mr. von Marees and Paul Maple, who is a native Alaskan. Tr. Vol. II at 134, 152; CX 94. While his wife is a co-owner of Greenbuild, Mr. von Marees described her involvement in the company as very limited, consisting mostly of translating written communications with clients and suppliers for him, as his primary language is Spanish. Tr. Vol. II at 140, 159. "I am the one that works, I am the one that moves the hammer. The one that is on my knees installing floors," Mr. von Marees explained. Tr. Vol. II at 134. Mr. von Marees also characterized himself as a "very good worker" and a "very detailed person." Tr. Vol. II at 148.

With regard to the Turnagain Property, Mr. von Marees recalled that he was contacted by James Warfield, the homeowner, after Mr. Warfield had seen his work at another property. Tr. Vol. II at 71–72, 148. Formerly a very successful car salesman, Mr. Warfield had more recently gone into the business of "flipping" properties, Mr. von Marees explained. Tr. Vol. II at 71–72, 148, 150. Mr. Warfield represented that he owned a number of properties and wanted "to make a business with me" renovating them, Mr. von Marees continued. Tr. Vol. II at 128, 150. He "offered me something marvelous, [s]aying that we're going to earn thousands and thousands of dollars." Tr. Vol. II at 143, 150. At the time, Mr. von Marees said, he was unaware that "a lot of those properties were built pre-1978," and he had not previously renovated any "antique living spaces." Tr. Vol. II at 128, 143. Mr. Warfield eventually presented him with an extremely "thick" contract written in English to execute, which Mr. von Marees signed without reading. Tr. Vol. II at 148–50; 161–62.

One of the properties that Mr. Warfield was "flipping" was the Turnagain Property.[23] CX 7 at 5; CX 8; CX 10. Mr. von Marees claimed that he conducted "four lead tests" before beginning any work there. Tr. Vol. II at 139. He testified that he performed the tests out of caution for his workers, explaining that he did not want to "jeopardize" their safety by exposing them to asbestos and/or lead. Tr. Vol. II at 142. Mr. von Marees said that his wife, who had completed a training program and obtained a certificate with respect to asbestos and lead from the Municipality of Anchorage on behalf of the company, taught him how to do the "very simple" tests. Tr. Vol. II at 145–47; *see also* CX 103. In order to perform the tests, he took paint samples from inside the house – specifically, from a front-facing window frame, the floor, and the ceiling – as well as the garage door located in the front of the house. Tr. Vol. II at 164–167. He then prepared the samples and used the same types of tests as EPA requires, which can be purchased at any big box hardware store. Tr. Vol. II at 139, 147–148. All four of the tests came back negative for lead, Mr. von Marees repeatedly emphasized at hearing. Tr. Vol. I at 235; Tr. Vol. II at 115, 142–43, 115; *see also* CX 103, 105.

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filed in this case on Respondent's behalf. Tr. Vol. II at 150-52. The quality of those well-crafted pleadings reflects the accuracy of Mr. von Marees's description of his wife's high level of intelligence and competency.

[23] A copy of the "Agreement between Owner and Contractor for Work" between the owner of the Turnagain Property (15th Avenue LLC) and Respondent, dated June 13, 2018, entered into the record, is unsigned. CX 8.

With regard to the work that Respondent performed at the Turnagain Property in 2018, Mr. von Marees recalled that he took over the job from a prior contractor and that "[m]any parts of the home were already demolished." Tr. Vol. II at 142–43; *see also* Tr. Vol. I at 95–96, 143; CX 7 at 5; CX 94. He acknowledged that he installed "all new siding on top" of the old siding but denied performing any work on the fascia board, testifying that "[w]e did not touch that." Tr. Vol. II at 167–68; *see also* Tr. Vol. I at 146. He also emphatically declared that Respondent "never did any work on the rear of the house" and that "as far as the paint chips around the house, that wasn't us either." Tr. Vol. I at 154; *see also* Tr. Vol. I at 111–12 ("We never touched the back part of the house."), 142 ("[W]hy do we have to be the ones guilty of doing this when there was [sic] painters before that that did that? Why should we pay for this when we were only doing the siding of the house?").

Mr. von Marees also testified regarding the inspection conducted by Ms. Farnham and "another gentleman" at the Turnagain Property. Tr. Vol. II at 129. Ms. Farnham was "[v]ery friendly" and "a very nice lady," who told him "about what EPA is" and what it does, he recalled. Tr. Vol. II at 129. He acknowledged their discussion of "all the times that they had tried to contact me and reach out to me." Tr. Vol. II at 129. He testified that in response to that topic, he advised Ms. Farnham, "Unfortunately[,] I did not believe that you guys were a government office. Because the municipality of Anchorage in Alaska, they never told me anything about EPA and their certifications." Tr. Vol II at 129. He also recalled telling Ms. Farnham that his company had been certified by the City of Anchorage with respect to lead and asbestos and Ms. Farnham responding that he needed federal certification as well. Tr. Vol. II at 145–46. He said that he offered his "apologies," stating that he was unaware of this requirement, and asked her to provide him with the information needed to comply. Tr. Vol. II at 146.

During his testimony, Mr. von Marees forcefully challenged the truth of Ms. Farnham's testimony that, as part of the inspection, she walked around the Turnagain Property to observe the premises, insisting that she remained next to him by his pickup truck for the duration of the inspection. Tr. Vol. II at 131 ("Agent Kim never walked around the house, she was right next to me the whole time in front of my pickup truck."), 132 ("[M]y pickup truck is very separated from the area of construction. That's why I want to point out to you that Agent Kim was always next to me. Next to my pickup truck. We were speaking. She was always by my side. . . . [S]he never moved away from me. She was right next to me speaking until we finished the conversation and then they left."). He also challenged her testimony regarding her observation of pressure washing during the inspection, stating, "[D]id you see us spraying, like the photos you sent to us? Can you show where my subcontractors or any of my workers were doing the water spraying there?" Tr. Vol. I at 143. While he acknowledged on cross examination that the "scope of work" provision in the contract that he signed with respect to the Turnagain Property included painting and pressure washing the exterior of the house, he then claimed that "there were change orders," implying that Respondent did not actually perform any such work at the Property. Tr. Vol. II at 162–62 (referring to CX 8 at 13 ¶ 12).

Mr. von Marees also acknowledged that during the inspection, Ms. Farnham asked him to submit to her the RRP Rule certifications when he obtained them, along with contact information for all of the subcontractors working on the Turnagain Property. Tr. Vol. II at 130. However, he then unequivocally maintained that Ms. Farnham represented to him that as long as he complied with this request, he would receive only a warning and no monetary penalty would be imposed. Tr. Vol. II at 133; *see also* Tr. Vol. I at 139–140, 141. He claimed that in response, he promised to comply, with "everything [being] kept like the book says, in order." Tr. Vol. II at 133.

Relying upon Ms. Farnham's promise of only a warning, Mr. von Marees asserted that he subsequently submitted to her the names of Respondent's subcontractors. Tr. Vol. I at 139–40; Tr. Vol. II at 143; *see also* CX 50, 60. In addition, he testified, he paid $800 to obtain an EPA firm certification for Greenbuild and $600 to obtain an EPA renovator certification for himself, for a total of $1,400, which he characterized as "really a lot of money" for his small business. Tr. Vol. II at 130. Mr. von Marees described the effort he undertook to obtain the EPA renovator certification, stating, "I spent a week in training. Where I learned a lot. About EPA, about lead. That I have never in my life heard any of that information that I learned doing that."[24] Tr. Vol. II at 130–31. Mr. von Marees acknowledged that obtaining this certification put him "[o]n a different level to be able to do something later in the future." Tr. Vol. II at 143.[25]

Mr. Paul Maple was the last witness to testify at hearing. He stated that he had worked for GreenBuild for six to seven years, "off and on." Tr. Vol. II at 188. He recalled that on the day of the EPA inspection at the Turnagain Property, he was installing new siding over the old siding on the front of the house. Tr. Vol. II at 189. Mr. Maple said he was "within earshot" of the conversation that occurred between Mr. von Marees and Ms. Farnham near the front of the house. Tr. Vol. II at 189–190. Mr. Maple recalled specifically hearing Ms. Farnham telling Mr. von Marees that they were "getting off with a warning and that if . . . she got a hold of, like, all our sub-information or something like that that it would just be that, just a warning." Tr. Vol. II at 186; *see also* Tr. Vol. II at 188. As to the actions of the inspectors, he testified that "[o]ne was

[24] Mr. von Marees's recollection of the fees he paid for the RRP Rule certifications and the time he spent in training is inconsistent with that of Ms. Tartaglia. Ms. Tartaglia testified that EPA charges $300 for firm certification obtained through its website, which is valid for five years. Tr. Vol. II at 119. Further, she advised that the renovator certification involves taking an eight-hour training class, at a cost of $250-$300, and that certification also lasts five years. Tr. Vol. II at 119; *see also* CX 7 (Farnham Inspection Report noting "8-hour Renovator Class").

[25] Respondent obtained firm certification on August 10, 2018. CX 11; CX 13. Mr. von Marees obtained his renovation certification some time after December 28, 2018. CX 12 at 1 (December 28, 2018 email from Mr. von Marees indicating he has yet to take the renovator certification classes). At hearing, Mr. von Marees suggested that Respondent was no longer in operation, explaining that he had recently undergone a number of surgeries and, as a result, could no longer employ Mr. Maple. Tr. Vol. II at 136-37. Mr. von Marees continued that the surgeries, along with the pandemic, left him with "practically no source of income." Tr. Vol. II at 137-38. As a result, he averred, he was currently looking for alternative, less physically strenuous, employment, such as supervising the landscaping work of friends. Tr. Vol. II at 137, 153-54, 173-74. To that end, he acknowledged incorporating a new business in Alaska in March of 2022 called GreenBuild Design & Landscaping LLC. Tr. Vol. II at 169-70; CX 111-113. As the company intends to do only landscaping and yard work, it is not EPA certified under the RRP Rule, Mr. von Marees stated. Tr. Vol. II at 175-76.

walking around [and] the other one was talking" to Mr. von Marees. Tr. Vol. II at 185. He also confirmed the testimony of Mr. von Marees to the effect that Greenbuild had "atypical[ly]" suspended its operations for the last six months and that the company was transitioning from construction to landscaping work. Tr. Vol. II at 187.

IV. PENALTY ANALYSIS

According to the Rules of Practice, "[t]he complainant has the burdens of presentation and persuasion . . . that the relief sought is appropriate." 40 C.F.R. § 22.24; *see also New Waterbury, Ltd.,* 5 E.A.D. 529, 536–38 (EAB 1994) (Remand Order). Once the complainant has established its prima facie case, the respondent then bears "the burden of presenting . . . any response or evidence with respect to the appropriate relief." 40 C.F.R. § 22.24. In this matter, Complainant seeks the imposition of a civil penalty in the amount of $25,609, Brief at 3–4, while Respondent essentially maintains that a warning alone, rather than any monetary penalty, is the appropriate sanction, *see, e.g.*, Tr. Vol. II at 186.

Where a violation has occurred and the complainant has sought a civil administrative penalty, as is the case here, I am tasked with "determin[ing] the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "explain[ing] in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). As indicated above, under TSCA, the factors to be considered in determining the appropriate civil penalty are "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." 15 U.S.C. § 2615(2)(B). I am also required by the Rules of Practice to consider any civil penalty guidelines issued under the Act and, if I decide to impose a penalty in an amount differing from that proposed by Complainant, explain with specificity the reasons for the departure.

With that, I will now analyze each of the penalty factors, with due consideration to the ERP, in the context of this case.

A. Nature of the Violation

The first two violations for which Respondent was found liable stem from its failure to have the required firm and renovator certifications at the time it performed the work on the Turnagain Property. Ms. Tartaglia identified this type of violation as a "recordkeeping violation." Tr. Vol. I at 206. The remaining two violations for which Respondent was found liable involve its failure to post warning signs and lay plastic sheeting around the work site, which Ms. Tartaglia described as "work practice standard" violations and considered to be more serious in nature. Tr. Vol. I. at 206; Tr. Vol. II at 29. In the context of the ERP, she characterized all but the third violation as "chemical control" in nature. Tr. Vol. II. at 32. As for

the third violation, the failure to post warning signs, she characterized its nature as a "hazard assessment violation." Tr. Vol. II at 31–32.

The ERP describes the "nature of a violation" as its "essential character." CX 96 at 16. It goes on that the nature of TSCA violations falls into one of three categories: "chemical control," "control-associated data gathering," or "hazard assessment." CX 96 at 16. The requirements of the RRP Rule, it directs, "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." CX 96 at 16. Conversely, the ERP describes requirements that are considered to be "hazard assessment" in nature as "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." CX 96 at 16. For the purposes of the ERP, violations of chemical control requirements are designated with an "a" and violations of hazard assessment requirements are designated with a "b" in the matrices. CX 96 at 30, n.48. The ERP then assigns higher base penalty amounts to chemical control violations than to hazard assessment violations. CX 96 at 40. As Ms. Tartaglia testified, per the ERP, all of the violations for which Respondent was found liable are designated by an "a" (chemical control violations), except for the third violation involving the failure to post warning signs, which is designated by a "b" (hazard assessment). This assessment appears to be correct.[26]

The impetus for the passage of the Act was the finding that substantial amounts of lead-based paint can be found in the vast majority of American homes built before 1950, posing a danger to children, and such danger needed to be abated through government measures to prevent exposure. 42 U.S.C. §§ 4851, 4851a. The Act explicitly mandated that EPA "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

[26] The ERP identifies the violations set out in the first two counts of the Complaint (described in the ERP as 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 to 40 C.F.R. § 745.89(a) pursuant to 40 CFR § 745.81(a)(2)(ii)" (Count 1) and the "[f]ailure of a renovator or dust sampling technician, performing renovator or dust sampling responsibilities under 40 C.F.R. § 745.90(b) or (c) to obtain a course completion certificate (proof of certification) under 40 CFR § 745.90(a), pursuant to 40 C.F.R. § 745.81(a)(3)" (Count 2)) as "Level 3a" violations. CX 96 at 32 (App. A §§ VII(1), (6)). The ERP identifies the violation set out in Count 3 of the Complaint (described in the ERP as the "[f]ailure of firms to post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area; to prepare, to the extent practicable, signs in the primary language of the occupants; and/or to post signs before beginning the renovation and make sure they remain in place and readable until the renovation and the post-renovation cleaning verification have been completed, pursuant to 40 C.F.R. § 745.85 (1)") as a "Level 1b" violation. CX 96 at 30 (App. A § I(8)). Finally, the ERP identifies the violation set out in Count 4 of the Complaint (described in the ERP as the "[f]ailure by the renovation firm, before beginning the renovation, to cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering, pursuant to 40 C.F.R. § 745.85(a)(2)(ii)(C)") as a "Level 2a" violation. CX 96 at 34 (App. A, § IX(8)).

contractors engaged in [lead-based paint] activities are certified." 15 U.S.C. § 2682(a)(1). Congress further specified that EPA promulgate guidelines for the conduct of "renovation and remodeling activities [in target housing] which may create a risk of exposure to dangerous levels of lead." 15 U.S.C. § 2682(c)(1).

The four violations committed by Respondent undermine Congress's directives that renovators of target housing be trained and certified on the risks of lead-based paint and follow work practices to minimize the risk of lead exposure to themselves and others. As such, the record supports Complainant's characterizations of the "nature" of the lack of certifications and protective plastic sheeting as violations of "chemical control." The record also supports characterizing the "nature" of failing to post warning signs as a violation of "hazard assessment," in that it prevented the public from assessing the risk of the property. Respondent has not contested these characterizations. Therefore, Complainant's determination as to the "nature" of the four violations is hereby accepted.

B. Circumstances of the Violation

According to the ERP, "[t]he term 'circumstance' represents the probability of harm resulting from a particular type of violation." CX 96 at 17. "The RRP Rule . . . requirements provide for engineering controls to limit exposures to lead during renovation and abatements and the cleanup procedures to reduce exposures to lead following renovations and abatements." CX 96 at 17. "Therefore, 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." CX 96 at 17. The ERP notes that the "circumstances" of violations are categorized into six numbered levels, divided into three groups: "high" (Levels 1 and 2); "medium" (Levels 3 and 4); and "low" (Levels 5 and 6), depending on the probability of impacting human health. CX 96 at 17-18.

Ms. Tartaglia determined the circumstance levels for the violations by comparing them against the list of violations set forth in Appendix A to the ERP (CX 96 at 30–39). Tr. Vol. II at 32–33. The ERP designates the circumstance level of the two certification violations (Counts 1 and 2) as "3," or a medium probability; the lack of warning signs violation (Count 3) as "1," or a low probability; and the lack of plastic sheeting violation (Count 4) as a "2," or high probability.[27] CX 96 at 30, 32, 34 (App. A, §§ I(8), VII(1), (6), IX(8)).

The logic behind the hierarchy of circumstances for the violations listed in the ERP is not completely clear and/or satisfactory to this Tribunal. It could well be argued that a contractor's failure to be trained and certified creates a very high probability of harm in that it essentially ensures that the contractor will be unaware of the requisite work practice standards and so unlikely to implement them. On the other hand, the mere lack of certification in this case is what

[27] See note 26 and its accompanying text above.

eliminated the potential validity of the lead tests that Mr. von Marees allegedly conducted prior to starting work. Had Respondent possessed the requisite certifications, then its alleged finding of the property to be lead free would have negated the work practice standard violations, meaning that those failures would have had no probability of harm. Similarly, I note that the lack of signage and plastic sheeting deprived the public of notice of, and protection from, exposure to lead-based paint, not only during the renovation, but ongoing as well, as there is no evidence in the record that Respondent removed any, much less all, of the paint dust and paint chips from around the Turnagain Property. Thus, at some point in the future, children might well come in contact with that lead-laden debris. Accordingly, I view Complainant's conclusions as to the "circumstances" or probability of harm of these specific violations as conservative estimates, and find that the real probability of harm from the violations is, in fact, higher.

C. Extent of the Violation

The ERP states that "[t]he term 'extent' represents the degree, range, or scope of a violation's potential for harm." CX 96 at 18. The focus is on the intent of the RRP Rule and the harm that it is designed to prevent, namely, serious health effects from childhood lead poisoning. CX 96 at 18. The measure of the "extent" of harm can be broken down into three categories: "major," "significant," and "minor." CX 96 at 18. The ERP advises that the appropriate category is determined by considering certain "determinable facts" relating to the actual violation that occurred, specifically, whether a pregnant person or child occupied or had access to the premises during the renovation. CX 96 at 18–19. Nevertheless, it advises that "[e]ven in the absence of harm in the form of direct exposures to lead hazards," this factor "should reflect the seriousness of the violation in terms of its effect on the regulatory program." CX 96 at 18. The ERP further states:

> For example, course completion certificates are used by inspectors to identify individuals at worksites who must perform key renovation activities under the RRP Rule. This allows inspectors to efficiently identify those individuals excluded from regulated renovation activities that require certified renovators and to document that each renovation firm employs and uses a certified renovator.

CX 96 at 18.

Referencing Appendix B to the ERP (CX 96 at 40-42), Ms. Tartaglia determined that the appropriate extent category for all of the violations in this case was "minor" in that neither pregnant persons nor children occupied or had access to the Turnagain Property during the renovation. Tr. Vol. II at 36–37. There is nothing in the record to contradict this factual conclusion regarding occupancy or access,[28] but the assessment arising from it seems, at least to

[28] Indeed, Mr. von Marees testified that there were "just a lot of adults" in the neighborhood where the Turnagain Property was located, including in the homes immediately surrounding it. Tr. Vol. II at 154–55. As for the Turnagain Property itself, Mr. von Marees testified that it was purchased by Mr. Warfield during an estate sale when the previous owner, a single adult, died. Tr. Vol. II at 154-55.

this Tribunal, to minimize the potential for harm as it fails to take into account future occupancy and access and the amount of debris left on the bare ground around the house, which appears to be substantial. *See* CX 32, 33, 35, 36, 39, 40, 46, 49 (inspection photographs evidencing paint dust and debris on the bare ground adjacent to the house). This newly renovated home could well have, as future residents, pregnant persons and/or young children who could unknowingly come into contact with the paint dust and chips on or in the ground around the property. Thus, I consider Complainant's characterization of the extent of the violations' potential for harm as "minor" to be an underestimation.[29]

D. Gravity of the Violation

In most of its penalty policies, the Agency has defined the concept of "gravity" as "the seriousness of the violation." CX 98 at 3 n.11. Following the ERP methodology, Ms. Tartaglia used the nature, circumstance, and extent factors she had calculated (as well as the date on which the violations occurred, *i.e.,* after January 12, 2009) to find the "gravity-based penalty amount" assigned to each of the four violations in the ERP's Appendix B matrices (CX 96 at 40–42). Tr. Vol. II at 37–38. From those matrices, Ms. Tartaglia determined that the appropriate gravity-based penalties for the first and second violations involving a lack of firm and renovator certifications (3a/minor) were $4,500 each and for the fourth violation involving a lack of protective plastic sheeting (2a/minor) was $6,000. Tr. Vol. II at 37–38; CX 96 at 41. Next, as directed by the EPA Memo, Ms. Tartaglia accounted for inflation since those penalty amounts were initially determined by multiplying the total gravity-based penalty for the three violations ($15,000) by 1.08203, for a new sum total of $16,230. Tr. Vol. II at 39; CX 98 at 14.

As to the third violation involving a lack of warning signs (1b/minor), Ms. Tartaglia stated that because this violation was categorized in the ERP with a circumstance level of "b," she alternatively relied upon the matrix in the Section 1018 ERP to determine $2,580 as the initial appropriate gravity-based penalty. Tr. Vol. II at 39–40, 248–50; CX 98 at 14 n.30; CX 97 at 34. Then she also adjusted this gravity-based penalty for inflation using the multiplier applicable to the Section 1018 penalties by adding to it the product of multiplying the base penalty by 1.64990, to reach an overall gravity-based penalty for the third violation of $4,257. Tr. Vol. II at 41–42; CX 98 at 14.

Thus, in total for the four violations for which Respondent was found liable, Ms. Tartaglia calculated the unadjusted gravity-based penalty, as increased for inflation, to be $20,487, under the first stage of the ERP penalty calculation methodology. Tr. Vol. II at 42. Respondent does not specifically challenge these mathematical calculations to determine the "gravity-based penalties," as adjusted for inflation, in accordance with the various guidance documents issued by the Agency. Such calculations appear to be correct and are accepted here.

[29] Ms. Farnham testified that pressure washing can cause paint chips to travel to neighboring properties, thus expanding those potentially at risk from lead paint. Tr. Vol. I at 165. Further, the RRP Rule requires contractors to collect water used in pressure washing because of the potential for contamination by lead paint chips and debris. Tr. Vol. I at 169-70. There is no evidence of this occurring at the Turnagain Property.

E. Respondent's Degree of Culpability

"The culpability statutory factor generally measures the level of the violator's fault or 'blameworthiness' and frequently includes a consideration of a host of factors to assess the violator's wilfulness [sic] and/or negligence." *Phoenix Constr. Serv., Inc.*, 11 E.A.D. 379, 418 (EAB 2004) (citing, *inter alia*, Webster's Third New International Dictionary 552 (1993)). The ERP allows for the violator's "degree of culpability" to be accounted for by an upward or downward adjustment of the gravity-based penalty by up to 25 percent. CX 96 at 20. In assessing the degree of culpability, the ERP directs that three factors should be considered: 1) the amount of control that the violator had over the events constituting the violation; 2) the violator's level of sophistication in dealing with compliance issues; and 3) the extent to which the violator knew, or should have known, of the legal requirement that was violated. CX 96 at 20. Moreover, it states that "[k]nowing or willful violations generally reflect an increased culpability on the part of the violator and may even give rise to criminal liability." CX 96 at 20.

In this case, Complainant determined that an increase in the gravity-based penalty by the full 25 percent allowed for under the ERP was warranted in consideration of Respondent's culpability. Tr. Vol. II at 43–64. Ms. Tartaglia stated that this determination was supported by "overwhelming evidence" reflecting that Agency inspectors had reached out to Respondent a number of times informing it of the RRP Rule requirements and unsuccessfully attempted to schedule recordkeeping inspections, prior to the violations occurring. Tr. Vol. II at 44.

Respondent challenges Complainant's position and an increase of the assessed penalty on the basis of its culpability in a number of respects. First, at hearing, Mr. von Marees denied that Respondent had any actual control over the violative workplace practices. Specifically, he suggested at hearing that Respondent's workers did not engage in pressure washing or undertake any work disturbing the white painted fascia around the Turnagain Property. Tr. Vol. I at 141–44, 154, 163. He indicated that others engaged in such work, perhaps even before Respondent was retained. Tr. Vol. I at 142–43. Consistent with this testimony, Ms. Farnham's Inspection Report indicates that during the inspection, Mr. von Marees identified "C & C Contracting" as the firm then actively engaged onsite in pressure washing the house and that Respondent had hired "subcontractors for painting, plumbing, roofing, and electrical work." CX 7 at 5.

However, I note that the scope of work in Respondent's agreement as to the Turnagain Property specifically included "[p]rep, pressure wash, and paint exterior" and "[r]epair and replace any fascia as needed," which suggests that such work had not been undertaken or contracted for by the owner directly prior to or separate from Respondent's engagement. CX 8 at 13. Consistent therewith, the Invoice for the "Complete house remodeling" that Respondent

submitted to the owner for payment listed, among other services that it provided, "paint all interior and exterior" and "paint all trims."[30] CX 9.

Likewise, on the day of the inspection, the workers onsite presented Mr. von Marees as the person "in charge." Tr. Vol. I at 161. Photographs taken at that time unequivocally reflect *active* pressure washing of the house, as well as wet white paint chips and debris on the bare ground around the foundation of the house. *See, e.g.*, CX 34, 42 (worker visible in the background holding an operating pressure washer); CX 26–30, 53 (water stream visible above the back of the house); CX 37–38, 47–48 (wet window, board, and floors adjacent to the house's front door); CX 35–36, 39–40, 46, 49, 52 (white paint chips on bare ground); *see also* Tr. Vol. I at 76, 78–79, 89–90, 93, 99–100, 103, 105–06, 143–44, 160–61, 163, 165 (Ms. Farnham testifying that "[w]hen you're pressure washing, because it's high pressure, the paint chips can fly . . . ."). The inspection photographs also evidence wood facia board cleaned of loose paint and dirt in anticipation of repainting. *See, e.g*., CX 32–33, 47 (front of house showing wood fascia board with missing paint); CX 27–31 (sides of house showing white fascia); CX 43–45, 50, 53, 55 (close up of fascia board with missing white paint on sides of the house); CX 42 (back of house showing white fascia board). Mr. von Marees also admitted during the inspection that Respondent had no contracts with the subcontractors, just "that he was paying them for their services." CX 7 at 5.

Based on the foregoing evidence, I find that Respondent did have actual control over the events constituting both the work practice standard and certification violations.

Second, as to its level of sophistication in dealing with compliance issues, Mr. von Marees suggested in his testimony that Respondent was a very small company and not particularly sophisticated in dealing with compliance issues, such that it was dependent on information provided to him by the Municipality of Anchorage building department. *See, e.g.*, Tr. Vol. II at 129–30, 134. However, he also testified that Respondent had been in the construction business since 2007, more than a decade before the violations occurred, and that the company had undergone training required by the Municipality of Anchorage to comply with its lead and asbestos regulations. Tr. Vol. II at 146–47, 155–56. He also touted his attention to detail and meticulous nature. Tr. Vol. II at 149. Thus, I find that Respondent was at least moderately sophisticated as to general compliance issues.

Third, as to whether Respondent knew, or should have known, of the legal requirements that were violated, Complainant offered a laundry list of direct communications between EPA and the company occurring prior to the inspection on July 25, 2018, which, it argues, demonstrates that Respondent knew or should have known of the RRP Rule's requirements. Those contacts included the following:

[30] Whether Respondent actually ever hired a subcontractor to perform the exterior painting work is unclear, as Mr. von Marees advised Ms. Farnham by email in October 2018 that the only work Respondent subcontracted out to others was "electrical, plumbing and heating," representing that "[a]ll the rest of the work is done by Greenbuild [sic]." CX 7 at 5; CX 12 at 4.

- In 2015, after Respondent was issued building permits for two target properties, EPA Inspector Laurie Fay spoke "in detail" with Respondent about the RRP Rule requirements and sent out a notice of inspection scheduling an in-person inspection for December 9, 2015.[31] Ms. Fay followed up by sending Respondent two emails verifying the date and time of the impending inspection, but Respondent was a "No-Show" at the inspection. Tr. Vol. II at 44–45 (testimony of Ms. Tartaglia);[32] CX 83 at 3–4; *see also* CX 85 at 1.

- On January 19, 2016, Ms. Fay emailed Mr. von Marees (a/k/a Mr. Diaz) requesting information as to whether he and GreenBuild had obtained the necessary certifications. Respondent did not respond to this email. CX 83 at 4.

- In response to another building permit being issued to Respondent on a target property in June 2017, the Agency sent a notice of inspection dated June 27, 2017, to GreenBuild at its office address.[33] CX 80; CX 83 at 4–5; *see also* CX 85 at 1. That notice advised Respondent that the Agency would be performing a "record keeping inspection" with Respondent at the local EPA office to "determine compliance with the Residential Property Renovation Requirements," including the RRP Rule, on July 13, 2017. CX 80 at 1. It further explicitly advised Respondent that "renovators **and firms**" must be "**certified**" to perform renovations on housing built prior to 1978 and must follow "work practices" to minimize lead exposure. CX 80 at 1. Consistent therewith, the notice stated that Respondent would be asked to produce at the inspection evidence of its RRP Rule

[31] The fact that Respondent pulled these building permits in 2015 strongly suggests that its work in 2018 on the Turnagain Property was not the first time it undertook renovations of a target property without possessing the required certifications and/or complying with work practice standards. Further, it suggests an additional reason why Respondent likely had notice of the RRP Rule requirements, in that Ms. Farnham testified that for five or six years immediately after the RRP Rule was promulgated in 2010, EPA Region 10 did a lot of direct outreaches to contractors. Tr. Vol. I at 175. After that, it focused its outreach efforts on building permit offices that were familiar with the local contractors and could make the contractors aware of the RRP Rule. Tr. Vol. I at 175-76. Such efforts included leaving pamphlets on the RRP Rule *in the permitting offices*. Tr. Vol. I at 176.

[32] While Ms. Tartaglia's testimony on this point (and others) was hearsay, hearsay is admissible in this proceeding. *See* 40 C.F.R. § 22.22(a)(1) ("The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious or otherwise unreliable, or of little probative value . . ."); *Pyramid Chem. Co.*, 11 E.A.D. 657, 675 (EAB 2004) (Default Order and Final Decision) ("Generally, hearsay is admissible in administrative law proceedings. . . . We have held, 'Hearsay evidence is clearly admissible under the liberal standards for admissibility in the [Rules of Practice], which are not subject to the stricter Federal Rules of Evidence.'")(quoting *William E. Comley, Inc.*, 11 E.A.D. 247, 266 (EAB 2004)). I found Ms. Tartaglia's testimony on this point to be reliable as it was quite specific, i.e., she identified the inspector by name and the year the contact was made, and such contact was consistent with EPA's general compliance assurance methodology as testified to by both Ms. Tartaglia and Ms. Farnham. Tr. Vol. II at 44-45; CX 80 at 2.

[33] This notice was addressed to "Mr. Rodrigo Diaz" and GreenBuild at "11221 Olive Lane, Anchorage, Alaska 99515" and was sent by "certified mail, return receipt requested." CX 80 at 1. Ms. Tartaglia testified that the Agency had evidence that Respondent received this and other notices, but such evidence was not introduced into the record. Tr. Vol. II at 121-22.

certifications, a list of renovation work performed on target housing, and lead check test kit results forms, among other documents. CX 80 at 2. Finally, the notice indicated that enclosed with it was a "Small Business Information Sheet" and an "EPA Lead Compliance Assistance Packet."[34] CX 80 at 2.

- In response to another building permit being issued to Respondent on a target property in September 2017, the Agency sent another notice of inspection – almost identical to that dated June 27, 2027, but this time dated September 25, 2017 – advising Respondent of a record keeping inspection set for October 12, 2017, at the local EPA office.[35] CX 81; CX 83 at 5; *see also* CX 85 at 1.

- On October 4, 2017, EPA Inspector Rob Hamlet spoke with Mr. von Marees via telephone and confirmed both his receipt of the September 25, 2017 notice of inspection and attendance at the record keeping inspection scheduled by way of the notice. CX 82 (log of their telephone conversation noting that the "package did arrive" and that Mr. Hamlet "convinced the owner to attend meeting next Thursday [October] 12 @ 11 am @ EPA Anchorage Office"); *see also* CX 83 at 5. Mr. Hamlet followed up this call by sending Respondent an email with a copy of the notice of inspection and directions to the inspection location. CX 83 at 5. Respondent failed to attend the scheduled record keeping inspection with the Agency on October 12, 2017. CX 83 ("Recordkeeping and Reporting Inspection Action Report" indicating that Mr. von Marees was a "no show" because, as he indicated in a subsequent telephone call, "he was to [sic] busy and could not make the meeting"); Tr. Vol. II at 7–8, 10–11 (testimony of Ms. Tartaglia that Mr. Hamlet advised her that he had previously been unable to conduct an inspection with Respondent); CX 6 at ¶ 59(c).

- On April 12, 2018, Ms. Tartaglia personally spoke by telephone with Mr. von Marees, advising him of her concerns regarding the missed inspection and the fact that he had pulled a building permit on a pre-1978 home when he was not RRP Rule certified. Tr. Vol. II at 8, 11–13; CX 6 at 2. She also counseled him "in[] depth about the RRP Rule requirements" and warned "that he needed to be firm- and renovator-certified before he could work on a pre-1978 home." Tr. Vol. II at 12; *see also* CX 6 at ¶ 59(b). In response, Mr. von Marees represented to Ms. Tartaglia that he understood the RRP Rule requirements and would no longer work on target housing.[36] Tr. Vol. II at 13; CX 6 at ¶ 59(b).

[34] Copies of these attachments were not entered into the record.

[35] This notice also was addressed to Mr. Rodrigo Diaz and GreenBuild at the 11221 Olive Lane address, indicated that it was sent by certified mail, and included the same enclosures as the June 27, 2017 notice. CX 81.

[36] Although the conversation was conducted in English, Ms. Tartaglia testified that she was confident that Mr. von Marees understood her based upon his appropriate responses in English. Tr. Vol. II at 12-13, 120.

- On April 25, 2018, Ms. Tartaglia sent "Mr. and Mrs. Rodrigo and Kari Von Marees," as the "Owners" of GreenBuild, a letter restating the RRP Rule requirements and citing four building permits for target housing that the Municipality of Anchorage's Building Safety Department had issued to Respondent from 2015 to 2017. CX 85 at 1; Tr. Vol. II at 13–15, 17, 19. The letter explicitly advised Respondent that "prior to offering (bidding) or performing renovation work at the pre-1978 residential properties listed above, you and your company needed to be certified . . . ." CX 85 at 1. It further stated that "last April 12, 2018, you informed EPA in a telephone conversation that Green Build [sic] Design & Construction, LLC will not offer (bid), perform, or claim to perform [renovations on] residential properties built before 1978." CX 85 at 1. The letter also identified the maximum penalty for TSCA violations as $37,500 per violation. CX 85 at 2.

- On July 2, 2018, the Agency sent Respondent a third notice of inspection advising it of the Agency's intent to perform an inspection on July 26, 2018. CX 6 at ¶ 15.

- On July 25, 2018, Ms. Tartaglia contacted Mr. von Marees by telephone and inquired as to whether he was available to attend the inspection set for the following day, July 26, 2018, since he had not responded to Mr. Hamlet's email or telephone call attempting to confirm the inspection. Tr. Vol. II at 21–22; CX 6 at ¶¶ 15–18. Mr. von Marees represented that he was not able to attend and asked to reschedule. Tr. Vol. II at 21–22; CX 6 at 3.

Mr. von Marees attempted to rebut the foregoing evidence by testifying that he was unaware of the RRP Rule requirements prior to the time of the drive-by inspection, asserting that Ms. Farnham was the first person to explain the requirements to him. Tr. Vol. II at 146. In support of this claim, he testified that his wife had advised him that telephone offers of EPA trainings were people "just trying to sell" to him. Tr. Vol. II at 127. He further testified that the Municipality of Anchorage building permit office never advised him of the EPA certification requirements, even in response to his direct inquiries. Tr. Vol. II at 129–130. While he acknowledged that EPA contacted him by telephone "several times," he alleged that each time he asked that the information be provided to him in Spanish, "my language, in order for me to be able to understand what they were trying to offer and say," implying that EPA never complied with his request. Tr. Vol. II at 127–28. Mr. von Marees also essentially admitted to failing to appear at an inspection scheduled by EPA, but he explained this failure away by claiming that EPA directed him to meet at a hotel, which he thought was "weird," "awkward," "strange," and potentially a scam. Tr. Vol. II at 128. Additionally, he specifically denied receiving the notices of inspection sent by the Agency to Respondent by certified mail in June and September of 2017 (CX 80 and 81, respectively). Tr. Vol. II at 48, 52. Likewise, Mr. von Marees denied receiving a voice message from Mr. Hamlet as reflected on the Agency's telephone log, asserting that that particular telephone line could not, in fact, accept voice messages. Tr. Vol. II at 57.

After considering all of the evidence of record, I give little credence to the exculpatory assertions of Mr. von Marees as to Respondent's alleged lack of knowledge of the legal

requirements that were violated, especially in regard to the need for certifications. Those statements are self-serving, and the Environmental Appeals Board has consistently held that such statements, particularly those that are uncorroborated by other evidence in the record, are entitled to little weight. *See, e.g.*, *Cent. Paint & Body Shop, 2* E.A.D. 309, 315 (EAB 1987) ("Self-serving declarations are entitled to little weight."); *A.Y. McDonald Indus., Inc., 2* E.A.D. 402, 426 (EAB 1987) ("[U]ncorroborated self-serving statements ... are entitled to little weight."). Moreover, I find that his self-serving assertions are in large measure contradicted by the weight of other more credible evidence in the record. In particular, I note that Mr. von Marees's claim that he did not receive the September 25, 2017 notice of inspection (CX 81) appears to directly conflict with Mr. Hamlet's telephone log (CX 83). Likewise, all of the Agency's notices of inspection in the record set the meeting location in EPA's Anchorage office, rather than a hotel, contradicting Mr. von Marees's recollection and explanation for his failure to attend one meeting scheduled by EPA. CX 80, 81. Further, while the Agency did send notices to Respondent in English, staff also directly spoke to Mr. von Marees about the RRP Rule requirements on at least three occasions. Tr. Vol. II at 8, 11–13, 44–45; CX 6 at 2; CX 82. In any event, the limited English language skills of Mr. von Marees do not necessarily reflect the capabilities of Respondent, as his wife, co-owner of the business and a native English-speaker, was explicitly tasked by the company with translating documents. Tr. Vol. I at 213; Tr. Vol. II at 140, 159. Therefore, I find that in regard to culpability, Respondent clearly "knew or should have known of the legal requirements" at the time of the violations. Respondent's failure to comply with the RRP Rules requirements, at least in terms of obtaining certifications before conducting renovations on pre-1978 housing, was clearly willful. As such, I consider a 25 percent increase in the unadjusted gravity-based penalty to be appropriate.[37]

F. Respondent's Ability to Pay or Continue in Business

Controlling caselaw has long established that in administrative enforcement actions for violations of statutes specifying the violator's ability to pay or ability to continue in business as a penalty factor, such as TSCA, the complainant has the burden of producing at the hearing as part of its prima facie case "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." *New Waterbury*, 5 E.A.D. at 541. To assist EPA in meeting this burden, the Environmental Appeals Board has ruled as follows:

> [I]n any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing. The rules governing penalty assessment proceedings require a respondent to indicate whether

[37] Complainant buttressed its culpability assessment by noting that five days after its drive-by inspection, before it became firm- and renovator-certified, Respondent again pulled a permit on target housing in violation of the RRP Rule. Tr. Vol. II at 73-74, 77; CX 87. While this might well be the basis for another enforcement action being brought against Respondent and/or be considered under another penalty factor, I do not believe that it is appropriate to consider this fact in determining Respondent's culpability in regard to the violations for which it was found liable in this action.

> it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange. In this connection, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty.

Id. at 542.

In support of Complainant's prima facie case as to the appropriateness of the proposed penalty in this matter, Ms. Tartaglia testified at the hearing that she examined various publicly accessible documents with respect to Respondent's financial status, as well as documents that Respondent provided relating to its work at the Turnagain Property, and concluded that Respondent has the ability to pay the proposed penalty. Tr. Vol. II at 88–89, 91, 99. As such, she made no downward adjustment to the penalty on this basis. Tr. Vol. II at 88–89, 91, 99.

Due to its failure to respond to Complainant's pre-hearing request for financial records necessary to more thoroughly evaluate the inability to pay claim, Respondent was barred from introducing evidence on ability to pay at the hearing. Order Granting Complainant's Mot. in Lim.. Accordingly, I find no legal basis upon which to reduce the penalty based upon this factor.

G. Respondent's History of Prior Violations

Ms. Tartaglia testified that Respondent did not have any history of prior violations – that is, any formal enforcement action against it – and she therefore made no upward adjustment based on this factor. Tr. Vol. II at 76–77. There is nothing in the record to suggest that this determination was erroneous and that the penalty should be adjusted upward to account for this factor.

H. Other Matters as Justice May Require

The ERP advises that this factor allows for an adjustment to the gravity-based component of a penalty based upon circumstances that may arise on a case-by-case basis, such as the violator voluntarily disclosing the violation before the Agency discovers it. CX 96 at 25–26 ("Violations must be disclosed to EPA before the Agency receives any information about the violations or initiates an inspection or investigation of the firm or individual."). In addition, under this heading, the ERP authorizes up to a 30 percent reduction of the gravity-based component of the penalty based upon a violator's "attitude," but *only* in cases where a settlement is negotiated prior to a hearing. CX 96 at 26.

Ms. Tartaglia opined at hearing that she found nothing in this case to warrant an adjustment on the basis of "other factors as justice may require." Tr. Vol. II at 101–02. On the other hand, Respondent raised a number of issues at hearing challenging the proposed penalty that are appropriate to consider under this catchall factor. For the reasons set forth below, I agree with Complainant that the record does not support reducing the proposed penalty based upon any "other factors as justice may require."

1. Turnagain Property Being Free of Lead Paint

The RRP Rule does not apply to renovations in target housing "in which a *certified renovator*, using an *EPA recognized test kit* . . . and following the kit manufacturer's instructions, has tested *each component affected by the renovation* and determined that the components are free of paint or other surface coatings that contain lead equal to or in excess of 1.0 mg/cm^2 or 0.5% by weight." 40 C.F.R. § 745.82(a)(2) (emphasis added).

Mr. von Marees acknowledged at hearing that he had never personally been trained to perform such tests by any entity authorized to provide such training and acknowledged that he was not certified by EPA to perform such lead tests at the time. Tr. Vol. II at 169. Nevertheless, he testified that prior to performing any work at the Turnagain Property, he tested the home in four places for lead-based paint and that all the tests came back negative.[38] Tr. Vol. II at 142–43, 164. He asserted that the type of test he performed was an "official test for residential properties" and "the same test EPA uses." Tr. Vol. II at 143, 147. Further, Mr. von Marees suggested that he was capable of properly performing the test because it is "[v]ery, very easy" and his wife had attended a course on lead and asbestos given by the Municipality of Alaska and had taught him how to do it. Tr. Vol. II 145–47. "It's a bottle with a sponge where you break it and you put the piece of paint, or sample of paint, inside and that's it. It's very simple. The sponge wets the paint and then there is a little card which gives you the results," he explained. Tr. Vol. II at 147. He argued at hearing that the negative lead test should be accounted for in mitigating the penalty. Tr. Vol. II at 115–16.

Mr. von Marees did not offer into evidence at hearing any documentation as to either the test kit he purportedly used or the results of the lead tests he conducted at the Turnagain Property, although the record suggests that he did provide evidence of the results of the alleged tests to EPA at some point. Tr. Vol. II at 115–16. However, even if I accepted as true that he performed the tests and obtained negative results therefrom, I would still find such evidence insufficient to prove that the Turnagain Property was "lead-free" at the time of the violations.[39]

[38] I note that Mr. von Marees's testimony on the subject appears to be inconsistent with the information he provided to Ms. Farnham at the time of the inspection. Specifically, Ms. Farnham's Inspection Report indicates that Mr. von Marees told her only that he had tested the "upstairs ceiling drywall" (inside the house) for lead but that he did not have "any documentation showing the negative results." CX 7 at 5.

[39] Complainant argues in its Brief that Mr. von Marees's understanding of the RRP Rule's specific testing requirements, his description of how to perform a lead check test, and any claim of being personally trained and

In particular, Mr. von Marees testified that he performed only one test on the outside of the house, on the garage door, with the rest performed inside the house on a window, ceiling, and floor.[40] Tr. Vol. II at 165–67. As such, it is clear that he never tested a key component affected by the renovation, that is, the painted wood fascia board where the walls and roof met and where the paint chips observed around the house following the pressure washing apparently originated.[41] Tr. Vol. II at 167–68; CX 22 (photograph of a worker pressure washing the white painted wood fascia and soffits of the Turnagain Property). Without such a test, the presumption that the paint from the fascia contained lead must stand. *See* 40 C.F.R. §§ 745.82(a)(2), 745.87(e); Tr. Vol. I at 68–69. Therefore, I concur with Complainant's determination not to reduce the penalty based upon the lead tests allegedly performed by Mr. von Marees purporting to show the property to be "lead-free." Tr. Vol. II at 115–16.

2. The Promise of a Warning

Mr. von Marees testified at the hearing that during the inspection, Ms. Farnham specifically represented to him that he would receive only a warning if he obtained the necessary certifications and provided her with information on his subcontractors. Tr. Vol. II at 133; *see also* Tr. Vol. I at 139–140, 141. Further, he suggested that in reliance upon her representation, he complied with all of her requests. Tr. Vol. II at 140–41 (Mr. von Marees testifying "Why are they trying to attack me, why are they trying to ruin me after doing exactly, to the letter, what the Agent Kim [Farnham] had told me to do. I did everything she said."); Tr. Vol. I at 162 (Mr. von Marees suggesting that he would not have provided Ms. Farnham with information as to his subcontractors if she had not promised only to impose a warning). Mr. von Marees's testimony was buttressed by that of Mr. Maple, who very credibly testified to overhearing Ms. Farnham telling Mr. von Marees that they would "get[] off with a warning" if they provided certain information. Tr. Vol. II at 186; *see also* Tr. Vol. II 188–89. Mr. von Marees further supported his claim at hearing by pointing to the testimony of Ms. Tartaglia regarding giving warnings to first-time violators, noting, "Like Ms. Maria said previously, she said if a company has no record, we need to essentially give them a warning." Tr. Vol. II at 138. He then urged that Respondent "does not have any previous bad records. Nothing with anyone." Tr. Vol. II at 133.

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certified by the Municipality of Anchorage are all incorrect. Br. at 28-33. Those arguments need not be addressed to resolve the issues presented here.

[40] Documentation as to the work Respondent performed on the Turnagain Property indicated that a new garage door (as well as new flooring and windows) was to be installed as part of the renovation process. CX 9 at 1; CX 8 at 12. Mr. von Marees's testimony did not specify whether he tested the old or new garage door (assuming the property had a painted garage door at the time Respondent's construction work began there).

[41] As noted above, the Act and the regulations implementing presume a property built prior to 1978, as the Turnagain Property was, has lead paint, until proven otherwise. 40 C.F.R. §§ 745.82(a)(2), 745.87(e); Tr. Vol. I at 69. Such an assumption appears particularly warranted in this case as the Turnagain property was built in 19*53*, in *Anchorage Alaska*, and (unlike the garage door) it is unlikely that the outside fascia board, was replaced since the house was first built. CX 7 at 3. *See also, Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 605 (7th Cir. 2014) (noting that now-banned white lead paint was used in residencies for its "strength, durability, flexibility, washability, brushability, and brightness.").

The foregoing evidence, in essence, raises an equitable estoppel claim. Equitable estoppel is a legal doctrine applied "where justice and fair play require it," *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), and it is generally invoked as an affirmative defense to liability, *see, e.g.*, *BWX Techs., Inc.*, 9 E.A.D. 61, 79-80 (EAB 2000) (treating the respondent's claim – that, even if it was found liable for the alleged violation, the complainant should be estopped from enforcing the complaint – as an affirmative defense of equitable estoppel and noting that Rule 8(c) of the Federal Rules of Civil Procedure identifies "estoppel" as such) (citing Fed. R. Civ. P. 8(c)). The ordinary elements of estoppel are as follows:

> (1) The party to be estopped must know the facts;
> (2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
> (3) The latter must be ignorant of the true facts; and
> (4) He must rely on the former's conduct to his injury.

United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978) (citing, *inter alia*, *United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975)).

Where a party is invoking the doctrine of equitable estoppel against the government, it must show, in addition to the above four elements, that "(1) the government engaged in affirmative misconduct going beyond mere negligence; (2) the government's wrongful acts will cause a serious injustice; and (3) the public's interest will not suffer undue damage by imposition of estoppel." *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011) (citing *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985)). As a general rule, however, application of the doctrine against the government is disfavored as a matter of public policy. *See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60, (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). Indeed, "the Supreme Court has alerted the judiciary that equitable estoppel against the government is an extraordinary remedy." *Bd. of Cty. Comm'rs of Cty. of Adams v. Issac*, 18 F.3d 1492, 1498-99 (10th Cir. 1994) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421-22 (1990)). A party seeking to estop the government thus carries a commensurately "heavy burden." *Yerger v. Robertson*, 981 F .2d 460, 466 (9th Cir. 1992).

Where an estoppel claim is denied, the Environmental Appeals Board has recognized that the facts underlying the claim may still serve as an equitable basis for mitigating the penalty assessed. *See B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 204 (EAB 1997), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000) ("Any harshness perceived to result from [the Environmental Appeal Board's denial of the respondent's estoppel claim] is tempered by the principle that the facts upon which [the respondent] unsuccessfully relies to show estoppel may nevertheless be considered in connection with assessing a penalty.") (citing *United States v.*

Marine Shale Processors, 81 F.3d 1329, 1349 n.11 (5th Cir. 1996); *United States v. City of Toledo*, 867 F.Supp. 603, 608 (N.D. Ohio 1994)).

In the present matter, I do not find the evidence presented by Respondent to merit application either as an affirmative defense that absolves Respondent of liability or as an equitable basis for reducing the penalty. Even if I assume for the purposes of this decision that Ms. Farnham made the representation that Mr. von Marees asserts,[42] the record lacks evidence that Respondent relied upon Ms. Farnham's representation to its detriment, much less that doing so caused a "serious injustice." Respondent's alleged reliance consisted primarily of it obtaining the requisite certifications, that is, coming into compliance with the law necessary to conduct its business. Mr. von Marees even acknowledged during the hearing that doing so put him "[o]n a different level to be able to do something later in the future" and that he therefore benefitted from coming into compliance. Tr. Vol. II at 143. The balance of its reliance involved providing the names of its subcontractors to the Agency. Respondent has not alleged, much less shown, that providing such information worked to its detriment. Accordingly, this claim is rejected, both in the context of an affirmative defense and the equity of the penalty assessed.

3. Racial Discrimination/Harassment

At hearing, Mr. von Marees raised an issue regarding the Agency failing to provide him with the applicable information translated into Spanish, his native language, suggesting that the failure to do so and/or the pursuit of this case against him constituted "racism." Tr. Vol. I at 9 (Mr. von Marees alleging that EPA has directed "a lot of harassment and racist [sic] towards [] me."); Tr. Vol. II 127–28 (Mr. von Marees alleging that EPA "called me several times, and several times I told them to send me the information and documents in Spanish, because that's my language, in order for me to be able to understand what they were trying to offer and say.").

The record does not support any mitigation of the penalty on this basis. First, Respondent has cited no legal authority imposing any obligation upon EPA to provide information or correspondence in Spanish, and this Tribunal has found no such obligation in the Act or TSCA. *Compare, e.g.*, 29 C.F.R. §§ 471.2(d), 825.300 (regulations implementing the Family Medical Leave Act that explicitly require posting in additional languages).

[42] At hearing, Ms. Farnham denied promising Mr. von Marees that he would be receiving only a warning. Tr. Vol. I at 158. In support, she represented that RRP Rule inspectors lack the authority to adjudge regulatory violations and assign penalties and cannot issue field warnings or field citations. Tr. Vol. I at 139-140, 141, 158-59, 172-73. She further testified that only case developers are authorized to determine whether an RRP Rule violation has occurred and calculate the appropriate penalty, Tr. Vol. I at 173-73, which Ms. Tartaglia confirmed during her testimony, Tr. Vol. I at 201-02. I note, however, that Ms. Farnham described her duties within her office as including serving as a "case developer" and stated that "if there are enforcement actions to be had after an inspection has been completed, I will do the case development" determining whether to pursue an enforcement case. Tr. Vol. I at 24-25. Further, she testified that she only became familiar with Respondent right before performing the inspection underlying this case, so it is conceivable that she was not fully cognizant of EPA's prior contacts with the company. Tr. Vol. I at 69, 76. She also may not have been aware of the limitations to the policy of providing first time violators with a warning as described by Ms. Tartaglia. Tr. Vol. I at 203-06. Therefore, I assume for the purposes of this decision that Ms. Farnham made the representation as alleged by Mr. von Marees and Mr. Maple.

Second, as a general rule, persons are obligated to know the law. *Bibeau v. Pac. Nw. Rsch. Found. Inc.*, 188 F.3d 1105, 1110 (9th Cir. 1999), *opinion amended on denial of reh'g,* 208 F.3d 831 (9th Cir. 2000) ("[T]he law presumes . . . that everyone is aware of the obligations the law imposes on them. . . . [Citizens] cannot escape the effect of that law by claiming ignorance. Were the rule otherwise, citizens could frustrate the legislature's exercise of authority by an ostrich-like effort not to learn their legal obligations."). The fact that English is not a person's native language does not vacate this obligation. *Soberal-Perez v. Heckler,* 717 F.2d 36, 43 (2d Cir. 1983) (relating to Social Security benefits), *cert. denied*, 466 U.S. 929 (1984) ("A rule placing the burden of diligence and further inquiry on the part of a non-English-speaking individual served in this country with a notice in English does not violate any principle of due process."); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (per curiam) (notice of forfeiture in English to French-speaking claimant satisfied due process); *Ai Hoa Supermarket, Inc. v. United States*, 657 F. Supp. 1207, 1209 (S.D.N.Y. 1987) (food stamp case in which English language notice was deemed sufficient).

Third, the record is replete with testimonial and documentary evidence showing that, prior to the inspection, the Agency reached out to Respondent through multiple avenues and provided it with information on the RRP Rule requirements. *See, e.g.*, CX 80–83, 85. However, there is no documentary evidence corroborating Mr. von Marees's claim that he ever requested any information be provided to him in Spanish. In any case, as Mr. von Marees acknowledged, his wife, the co-owner of Respondent, is an educated, native English speaker, and her primary role in the company involved translating business documents for it from English to Spanish. Tr. Vol. II at 140, 150-52, 159. Thus, I find that Respondent was, in fact, fully capable of understanding the correspondence and documents that EPA sent to it.[43] Accordingly, I find no merit in Respondent's claim of racial discrimination or harassment as a basis for penalty mitigation in this case.

4. Post-Inspection Violations

Complainant attempted to buttress its culpability assessment by noting that five days after EPA's drive-by inspection of the Turnagain Property, Respondent again pulled a permit on target housing, even though it had not yet become firm- and renovator-certified, in violation of the RRP

[43] At hearing, Mr. von Marees repeatedly objected to the admission of Complainant's exhibits on the basis that they were not provided to him in Spanish and, for the sake of efficiency, was granted a standing objection on that basis. Tr. Vol. I at 210, 213 ("In this case, I would remind you all that you all knew that my primary language is Spanish. None of these documents were ever provided to me in Spanish. I feel like this whole process is completely one-sided, I feel like I'm defenseless here."); Tr. Vol. II at 196, 199. His objections were overruled. This Tribunal notes that it was Respondent's choice to have Mr. von Marees as its sole representative in this proceeding, and to not have his wife or another native English speaker either help him prepare or present Respondent's case at hearing. Further, the exhibits offered in evidence by Complainant were all provided to Respondent long in advance of the hearing as part of the Complainant's prehearing exchange and there is no evidence in the record that Respondent at any point requested that the exhibits be provided to him in Spanish. Nevertheless, this Tribunal took Mr. von Marees's language limitations into account at hearing, providing interpreter services and requiring the Agency to provide the live testimony of Ms. Tartaglia on the penalty calculation, rather than solely submitting such explanation in writing. Tr. Vol. I at 200.

Rule. Tr. Vol. II at 73–74, 77; CX 87. While I do not consider this fact to be relevant to Respondent's culpability for the violations, I do consider it appropriate to examine it under the factor of "other matters as justice may require."

The record shows that on July 30, 2018, Respondent obtained a building permit to perform a renovation at the property located at 4220 Tahoe Drive in Anchorage ("Tahoe Property"). *See* CX 87 (indicating under the heading "Reviews" that permit number R18-2770 was "approved" as of July 30, 2018). Having been built in 1969, that is, before 1978, that residential property is covered by the Act. CX 88. Respondent became firm-certified to conduct lead-based paint renovation, repair, and painting activities pursuant to the RRP Rule on August 10, 2018. CX 11. As such, it was not firm-certified when it pulled the permit on the Tahoe Property. CX 12 (email indicating that Mr. von Marees was not certified as of December 28, 2018). Moreover, based upon the extensive prior contacts it had had with EPA regarding the RRP Rule, including at the Turnagain Property on July 25, 2018, as detailed above, Respondent certainly knew or should have known it could not lawfully offer to perform renovation work on target housing at the time it obtained the permit for the Tahoe Property. 40 C.F.R. § 745.81(a)(2)(ii) ("[N]o firm may perform, offer, or claim to perform renovations without certification from EPA . . . in target housing . . . ."); *see also* Tr. Vol. II at 119–21 (Ms. Tartaglia testifying that EPA advised Respondent in 2015, 2017, and 2018 that he could not pull a permit on target housing without the necessary RRP Rule certifications); Tr. Vol. II at 74–75 (Ms. Tartaglia testifying that Respondent committed another violation of the RRP Rule five days after the inspection at the Turnagain Property).

This action reflects extremely poorly on Respondent's attitude towards compliance with the RRP Rule, a negative attitude that is found throughout the record. *See generally* Br. at 4–5. It is noted that on a number of occasions, from 2015 through 2018, Respondent failed to respond to correspondence from the Agency and failed to participate in scheduled inspections with EPA, even after promising to attend. CX 83 at 3–5. Such a poor attitude further supports the penalty requested by the Complainant.

CONCLUSION AND ORDER

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

1. For the four violations for which Respondent was found liable in this case, Respondent is hereby assessed a total civil penalty of $25,609.

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[44] 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 EPA docket number (TSCA-10-2021-0006), 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: December 12, 2022
Washington, D.C.

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

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision**, dated December 12, 2022, 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

Copies by Electronic Mail to:
Andrew Futerman
Danielle Meinhardt
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GreenBuild Design & Construction, LLC
Email: rad@greenbuild.us.com
For Respondent

Environmental Appeals Board
U.S. Environmental Protection Agency
Email: clerk_eab@epa.gov
Email: cortes.emilio@epa.gov

Dated: December 12, 2022
Washington, D.C.