BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

POST-HEARING BRIEF

COMES NOW, the United States Environmental Protection Agency (Complainant), by and through its undersigned counsel and pursuant to this Court's May 24, 2022 post-hearing scheduling order, to respectfully offer the following post-hearing brief.

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I. INTRODUCTION

During the penalty-only hearing held the first week of May 2022, Complainant met its burden to show that its proposed penalty of $25,609 is reasonable and properly accounts for the potential harm to human health and the environment caused by GreenBuild Design & Construction, LLC (Respondent)'s violations. Respondent failed to show that its counterarguments should carry any weight, as each is meritless, irrelevant, or unsupported by the evidence. Therefore, this Court should order Respondent to pay $25,609 for its four violations of the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 to 2697 and the Lead Renovation, Repair and Painting Rule, or "RRP Rule." 40 C.F.R. Part 745, subpart E.

Respondent repeatedly placed human health and the environment at risk by performing renovations in target housing without complying with the lead-safe work practice standards and other requirements of TSCA and the RRP Rule. This Court agreed that Respondent violated TSCA and the RRP Rule during a renovation of 2208 Turnagain Parkway in Anchorage, Alaska

(the "Turnagain Property") and granted Complainant's motion for accelerated decision as to liability on November 17, 2021.

Complainant asked this Court to assess a $25,609 penalty against Respondent for these violations. Such a penalty is reasonable because it accounts for the potential harm that Respondent's violations posed to human health. In calculating the proposed penalty, Complainant considered the nature, circumstances, extent, and gravity of the violations and, with respect to the Respondent, its ability to pay, effect on its ability to continue to do business, history of prior such violations, degree of culpability, and such other matters as justice may require. TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). Complainant's penalty calculation is consistent with the *Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Paint Rule; and Lead-Based Paint Activities Rule* (Aug. 2010) ("RRP ERP"), CX 96, and other relevant guidance.

A. Factual Background

From 2015 through 2018, Respondent regularly violated TSCA and the RRP rule by performing or offering to perform renovations in target housing without first obtaining its EPA firm certification, as required by 40 C.F.R. § 745.81(a)(2)(ii). *See* CX 06 at 2–3; Trial Tr. vol. 2, at 7–8, 10–12. During this time period, Complainant communicated with Respondent multiple times about Respondent's responsibilities under TSCA. Trial Tr. vol. 2, 12 (Ms. Tartaglia explaining that she called Mr. von Marees to discuss the RRP Rule and its requirements); *see e.g.*, CX 83 at 3 (October 12, 2017 Inspection Report noting that Complainant had previously sent three notice of inspection letters to Respondent).[1] Complainant attempted to schedule in-

[1] *See also*, CX 80 (June 27, 2017 Notice of Inspection Letter); CX 81 (September 25, 2017 Notice of Inspection Letter); CX 82 (Telephone call log noting that on October 4, 2017, EPA

person inspections with Respondent on December 9, 2015, July 13, 2017, and October 12, 2017, in an attempt to bring Respondent into compliance with TSCA and the RRP Rule. *Id*. But Respondent disregarded each of these attempts, failed to show up for any of the scheduled in-person inspections, and continued violating the law. CX 80; 83; Trial Tr. vol. 2, 10–11.

EPA attempted to schedule a fourth in-person inspection with Respondent, to take place on July 26, 2018. Trial Tr. vol. 2, 20. EPA Compliance Officer, Ms. Socky Tartaglia, contacted Respondent the day before that inspection to confirm whether Respondent would be attending. Trial Tr. vol. 2, 21. Respondent stated that he would not attend. Trial Tr. vol. 2, 21–22.

As Respondent had already disregarded numerous inspection requests, EPA Inspectors Ms. Kim Farnham and Mr. Rob Hamlet decided to drive past Respondent's work site to see if Respondent was there. CX 04A at 7; Trial Tr. vol. 2, 22. When Ms. Farnham and Mr. Hamlet arrived at the Turnagain Property on July 25, 2018, Respondent was actively performing renovation activities on the residence, so they decided to perform an unannounced worksite inspection. CX 07; CX 04A at 8–9. Mr. Hamlet proceeded to walk around the Turnagain Property making observations and taking pictures, Trial Tr. vol. 1, 87; *see* CX 15 to 55 (inspection photos), while Ms. Farnham had a detailed conversation with Respondent's co-owner, Mr. Rodrigo von Marees. Trial Tr. vol. 1, 88–89; CX 07, 04A at 8–9.

While Ms. Farnham and Mr. Hamlet were at the Turnagain Property, Respondent's workers were pressure washing the exterior of the property. Trial Tr. vol. 1, 89–90. Respondent's work caused paint chips to fly from the eaves of the house. *See* CX 22 (photograph of a worker

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TSCA Inspector, Mr. Rob Hamlet spoke with Mr. von Marees about attending an in-person TSCA RRP Rule inspection which was scheduled for October 12, 2017); CX 83 (No Show Inspection Reports indicating that Respondent failed to show up for the October 12, 2017 inspection); CX 85 (April 25, 2018 letter to Respondent informing it of its responsibilities under TSCA and the RRP Rule).

power washing the white eaves of the Turnagain Property); CX 43 (photograph showing that the white paint on the eaves of the Turnagain Property had been disturbed). Those paint chips were then deposited on the bare ground. *See e.g.,* CX 35–36, 39–40 (photographs depicting white paint chips on the bare ground of the Turnagain Property); Trial Tr. vol. 1, 100–107 (Ms. Farnham discussing observing the white paint chips on the bare ground of the Turnagain Property).

Approximately five days after the inspection, on July 30, 2018, Respondent obtained another building permit to perform a renovation in target housing. *See* CX 87 (Building permit R18-2770 for 4220 Tahoe Drive, with final reviews completed on "7/30/2018" indicating that the building permit was issued on or about July 30, 2018); CX 88 (Public inquiry parcel detail noting that 4220 Tahoe Drive was built in 1969). Respondent was not EPA Firm certified at the time it obtained this building permit. CX 11.

B. Statement of the Case

On December 2, 2020, Complainant filed the complaint in this matter. Based on Ms. Farnham and Mr. Hamlet's observations made during the July 25, 2018 inspection of the Turnagain Property, Complainant alleged that Respondent committed four violations of TSCA and the RRP Rule.[2] Respondent filed its Answer on January 27, 2021. The Parties completed the prehearing exchange on May 24, 2021. Complainant moved for accelerated decision as to

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

liability on June 23, 2021. This Court granted Complainant's motion for accelerated decision on November 17, 2021.

From May 2 to May 3, 2022, this Court held an administrative hearing to determine the appropriate penalty for Respondent's four violations of TSCA and the RRP Rule. During that hearing, Complainant offered two witnesses: Ms. Kim Farnham and Ms. Socky Tartaglia. Ms. Farnham—a TSCA lead-based paint and RRP Rule expert, Trial Tr. vol. 1, 52—has been an Environmental Protection Specialist with the EPA for the past 22 years and served as a TSCA inspector for the past eleven years. Trial Tr. vol. 1, 23–24; CX 1, 4A. Ms. Tartaglia has been an Environmental Protection Specialist with the EPA for the past 26 years and a TSCA compliance officer for the past twelve years. Trial Tr. vol. 1, 181–82; CX 3, 6.

Collectively, Ms. Farnham and Ms. Tartaglia established a few key points, including how dangerous lead is, especially to small children; why Congress and EPA chose to regulate lead and lead-based paint as they did; how Respondent placed human health at risk by ignoring the lead-safe work practices required by TSCA and the RRP Rule; and that $25,609 is a reasonable penalty to be assessed against Respondent, considering the statutory factors laid out in section 16(a) of TSCA, 15 U.S.C. § 2615(a), and the RRP ERP.

Respondent offered two witnesses: Respondent's co-owner, Mr. Rodrigo von Marees, and Mr. Paul Maple, an employee of Respondent. To counter Complainant's case-in-chief, Respondent focused on three main arguments. First, Respondent argued that Mr. von Marees tested the Turnagain Property for the presence of lead and that test came back negative, and therefore no penalty should be assessed. Second, Respondent argued that a representative of GreenBuild received training from the State of Alaska, so no penalty should be assessed. And

third, Respondent argued that because Ms. Farnham told Respondent that it would receive a warning for the violations she observed, no penalty should be assessed.

II. COMPLAINANT MET ITS BURDEN TO SHOW THAT $25,609 IS A REASONABLE PENALTY FOR RESPONDENT'S FOUR VIOLATIONS OF TSCA AND THE RRP RULE

Based on all of the evidence in the record and the testimonies of Ms. Farnham and Ms. Tartaglia, this Court should find that $25,609 is a reasonable penalty to be assessed against Respondent for its four violations of TSCA and the RRP Rule. Such a penalty is consistent with the statutory factors and appropriately accounts for the potential harm that Respondent's actions caused.

A. The Proposed Penalty is Reasonable and Consistent with the Statutory Factors

Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and 40 C.F.R. Part 19 authorize EPA to assess administrative penalties for violations of TSCA up to $43,611 for each violation, each day such a violation continues. To determine the appropriate penalty to assess, TSCA requires EPA to consider the nature, circumstances, extent, and gravity of the violations and, with respect to the Respondent, ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. TSCA § 16(a)(2)(B).

To ensure national consistency in assessing penalties under TSCA and the RRP Rule, EPA published the RRP ERP. CX 96. The goal of the RRP ERP "is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations." CX 96 at 4. EPA "developed penalty policies to assure that Regional enforcement personnel calculate civil penalties that are not only appropriate

for the violations committed but are assessed fairly and consistently." *In re: DIC Americas, Inc*., 6 E.A.D. 184, 1995 WL 646512 at *4 (EAB 1995).

EPA applied the RRP ERP correctly in this matter. When Ms. Tartaglia calculated the proposed penalty, she first determined the number of independently assessable violations and considered whether Respondent realized any economic benefit from its noncompliance. Trial Tr. vol. 1, 27–31; CX 96 at 10. Ms. Tartaglia then calculated a gravity-based penalty by considering the nature, circumstances, and extent of each violation. Trial Tr. vol. 1, 31–38; CX 96 at 11. Then, after applying the appropriate inflation multiplier, Trial Tr. vol. 1, 38; *see 2020 Penalty Policy Inflation Memorandum and 2020 Penalty Inflation Rule* (Jan. 2020), CX 98 at 14, Ms. Tartaglia determined whether any adjustments to the gravity-based penalty were warranted. Trial Tr. vol. 1, 43.

1. Independently assessable violations

Each requirement of the RRP Rule is a separate and distinct requirement and the failure to comply with any such requirement is an independently assessable violation. CX 96 at 12. Here, Respondent failed to comply with four requirements of the RRP Rule. *See* Nov. 17, 2021 Order on Motion for Accelerated Decision. Therefore, sufficient evidence exists in the record to support the assessment of four separate violations. *See also*, November 17, 2021 Order on Motion for Accelerated Decision.

2. Economic benefit

The RRP ERP provides that civil penalties generally should remove any significant economic benefit resulting from failure to comply with the law. CX 96 at 13. EPA has previously determined that the cost to come into compliance with the RRP Rule's certification requirements is approximately $550 to $600—$300 for firm certification, plus approximately $250 to $300 for

renovator certification. CX 95 at 2–3. *See also* CX 13. As the cost to comply with these requirements can be split over multiple renovations, Respondent's cost-share associated with any given renovation is negligible. Ms. Tartaglia therefore determined that Respondent did not derive significant economic benefit through its noncompliance at the Turnagain Property. Trial Tr. vol. 2, 31; Trial Tr. vol. 2, 118–19.

3. Gravity component

Ms. Tartaglia determined the appropriate penalty for each violation of the RRP Rule by considering the "nature," "circumstance level," and "extent category" of each violation. CX 96 at 17–19. Trial Tr. vol. 2, 31–38.

The RRP ERP categorizes the nature of each violation—i.e., the "character of the violation," Trial Tr. vol. 1, 221—as either "chemical control" or "hazard assessment." *Id*.; CX 96 at 16. Most of the RRP Rule requirements are 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." Trial Tr. vol. 1, 222; CX 96 at 16. Violations of a chemical control nature are indicated by an "a" after the circumstance level in Appendix A and violations of a hazard assessment nature are indicted by a "b" after the circumstance level. Trial Tr. vol. 1, 229–30; CX 96 at 30.

The circumstance level reflects the probability of harm resulting from a particular type of violation, from a high probability of impacting human health and the environment (Levels 1 and 2) to a medium probability (Levels 3 and 4), to a low probability (Levels 5 and 6). Trial tr. vol. 1, 222–24; CX 96 at 17-18. "The greater the deviation from the regulations, the greater the likelihood that people will be uninformed about the hazards associated with lead-based paint and any renovations, that exposures will be inadequately controlled during renovations, or that

residual hazards and exposures will persist after the renovation/abatement work is completed." CX 96 at 17.

Ms. Tartaglia relied on Appendix A to the RRP ERP to determine the circumstance level for each violation. Trial Tr. vol. 2., 33; CX 96 at 30. According to Appendix A, the circumstance level for failure to obtain firm certification (violation 1) is 3a; for failure to ensure that the renovator certification requirements were met (violation 2) is 3a; for failure to post warning signs (violation 3) is 1b; and for failure to cover the ground with impermeable materials (violation 4) is 2a. Trial Tr. vol. 2, 33–35; CX 96 at 32, 32, 30, and 34, respectively.

The extent category represents the degree, range, or scope of a violation's potential for harm. Trial Tr. vol. 1, 224; CX 96 at 18. The measure of the extent of harm focuses on the overall intent of the RRP Rule and the amount of harm the rules are designed to prevent. Trial Tr. vol. 1, 225; CX 96 at 18. The primary consideration for determining the extent of harm is whether the specific violation could have a serious, significant, or minor impact on human health, with the greatest concern being for the health of a child under 6 years of age and pregnant women in target housing. Trial Tr. vol. 1, 224–27; CX 96 at 18. When considering the extent category of a violation, the RRP ERP instructs Ms. Tartaglia to consider three determinable facts: the age of any children who occupy target housing; whether a pregnant woman occupies target housing; and whether a child or children under six had access to the child-occupied facility during renovations/abatements. Trial Tr. vol. 1, 225–26; CX 96 at 18–19.

The Extent Categories are defined as: "Major" if one or more occupants under age six and/or pregnant woman was reside in the target housing during the time of the violation, "Significant" if a child between six and 17 years old were residing in the target housing, and "Minor" if no child under the age of 18 was residing in the target housing at the time of the

violation. Trial Tr. vol. 1, 224–25; CX 96 at 18–19, Appendix B at 41. Here, there were no children under the age of 18 in the Turnagain Property during the renovation. Trial Tr. vol. 2, 36–37. Therefore, Ms. Tartaglia determined that the extent level for each of the violations is Minor. Trial Tr. vol. 2, 37; CX 96 at 18–19.

a. Violations 1, 2, and 4

For violations 1, 2, and 4, Ms. Tartaglia relied on Appendix B to the RRP ERP to determine the appropriate gravity-based penalty to propose for each violation. Trial Tr. vol. 2, 37; CX 96 at 41. Appendix B of the RRP ERP provides that for each violation occurring after January 12, 2009, with a circumstance level of 3a and a minor extent level (violations 1 and 2), the gravity-based penalty is $4,500. Trial Tr. vol. 2, 38; CX 96 at 41. For a violation with a circumstance level of 2a and a minor extent level (violation 4), the gravity-based penalty is $6,000. Trial Tr. vol. 2, 37; CX 96 at 41. Ms. Tartaglia then accounted for inflation by multiplying the total gravity-based penalty for each of the three violations noted herein by 1.08203, Trial Tr. vol. 2, 39; CX 98 at 14, as depicted below:

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

b. Violation 3

Ms. Tartaglia treated violation 3 differently for the purposes of determining the appropriate gravity-based penalty. Trial Tr. vol. 2, 39. Rather than relying solely on the RRP ERP, Ms. Tartaglia also referred to the *Section 1018 – Disclosure Rule Enforcement Response and Penalty Policy* (Dec. 2007) ("Section 1018 ERP). Trial Tr. vol. 1, 248–49. The rationale for

this practice is explained in the 2020 Inflation Memo. Trial Tr. vol. 1, 249–50. Footnote 30 to the 2020 Inflation Memo reads:

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

CX 98 at n. 30; Trial Tr. vol. 1, 250–51. Ms. Tartaglia determined that violation 3 is a circumstance level 1b, extent level minor violation. Trial Tr. vol. 2, 39. As such, the appropriate penalty for violation 3 is $2,580. Trial Tr. vol. 2, 40; CX 97 at 34 (Gravity-Based Penalty Matrix for violations occurring on or after March 15, 2004: Level 1 Minor).

After determining the gravity-based penalty for violation 3, Ms. Tartaglia then accounted for inflation by multiplying the gravity-based penalty by 1.64990, Trial Tr. vol. 2, 41; CX 98 at 14, as depicted below:

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

Therefore, the total gravity-based penalty that Ms. Tartaglia calculated for Respondent's four violations of TSCA and the RRP Rule is as follows:

Violation	Circumstance	Extent	40 C.F.R. Part 745	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	$4,500

Count 2	3a	Minor	745.89(d)(1)	$4,500
Count 4	2a	Minor	745.85(a)(2)(ii)(C)	$6,000
			Gravity-Based Penalty	$15,000
			Inflation Adjustment (Gravity-Based Penalty x 1.08203)	**$16,230**
Count 3	1b	Minor	745.85(a)(1)	$2,580
			Gravity-Based Penalty	$2,580
			Inflation Adjustment (Gravity-Based Penalty x 1.64990)	**$4,257**
			Total Inflation-Adjusted Gravity-Based Penalty	**$20,487**

Trial Tr. vol. 2, 42; CX 95.

4. Gravity-based adjustment factors

After determining the appropriate inflation-adjusted gravity-based penalty, Ms. Tartaglia considered whether any factors warranted modifying the gravity-based penalty. Trial Tr. vol. 2, 43; CX 96 at 19.

a. Ability to pay

Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), requires EPA to consider a violator's ability to pay and effect on ability to continue to do business when determining an appropriate civil penalty. *See also*, Trial Tr. vol. 1, 241–42 (Ms. Tartaglia explaining that TSCA requires her to consider a respondent's ability to pay / continue in business when calculating a penalty). This duty is further elaborated upon in the RRP ERP, which provides that "absent proof to the contrary, EPA can establish a Respondent's ability to pay with circumstantial evidence relating to a company's size and annual revenue. Once this is done, the burden is on the respondent to demonstrate an inability to pay all or a portion of the calculated civil penalty." CX 96 at 22; Trial Tr. vol. 1, 241–42. *See also*, *New Waterbury, Ltd.*, 5 E.A.D. 529, 541–42 (EAB 1994) (finding that the agency must produce some evidence regarding a respondent's general financial status "from which it can be inferred that the respondent's ability to pay should not

affect the penalty amount" but the burden then shifts to the respondent to properly support its claimed inability to pay.).

Here, Ms. Tartaglia analyzed all information available to her to determine whether Respondent had the ability to pay a civil penalty. Trial Tr. vol. 2, 78. *See also* CX 75 to 78; CX 8 to 9. Based on that analysis, Ms. Tartaglia determined that an adjustment to the gravity-based penalty due to Respondent's ability to pay/continue in business was not necessary. Trial Tr. vol. 2, 91.

To meet its burden to demonstrate an inability to pay a civil penalty, Respondent would have had to submit financial information such as three to five years of its tax returns; balance sheets; income statements; statements of changes in financial positions; and statements of assets and liabilities. *See* CX 96 at 22-23. *See also*, CX 99 at 5. Ms. Tartaglia explained that she would have been open to receiving such information throughout the duration of this matter.

> Q [By Mr. Futerman] Okay. But if during this process Respondent had said to you that this determination was wrong, that this information was wrong, that it could not pay the penalty, would you have – what would you have done in that circumstance?
>
> A [By Ms. Tartaglia] I would ask him for additional financial information….
>
> Q Would you ever look at the information that we just discussed and say, Mr. von Marees, whatever information you're about to provide me doesn't matter. This Westlaw report, this Dun & Bradstreet report says that you can pay this penalty and that's the final answer?
>
> A No.
>
> Q No? So if Mr. von Marees had provided you more information, would you have considered that information?
>
> A Yes.

Trial Tr. vol. 2, 99–100.

Respondent has not submitted sufficient financial information from which EPA would be able to determine that Respondent is unable to pay a civil penalty. As such, Respondent has not met its burden to demonstrate an inability to pay all or a portion of the calculated civil penalty.

CX 96 at 22. Therefore, Ms. Tartaglia did not adjust the penalty based on Respondent's ability to pay and effect on ability to continue in business. *See also* April 4, 2022 Order Granting Complainant's Motion in Limine (excluding "Respondent from entering any evidence relevant to its inability to pay into evidence at the hearing" and inferring "from Respondent's failure to comply with the Prehearing order, and subsequent entreaties by the Agency, that any information Respondent could produce would be adverse to its" claim).

b. History of prior violations

Complainant is unaware of any prior instances in which Respondent has been cited for violations of the lead-based paint regulations at 40 C.F.R. Part 745 in the past five years. As such, Ms. Tartaglia did not adjust the penalty for this factor. Trial Tr. vol. 2, 76–77.

c. Degree of culpability

The RRP ERP provides that the degree of culpability factor may be used to increase or decrease a gravity-based penalty by up to 25 percent. CX 96 at 20. This factor reflects the violator's control over the events constituting the violations, its knowledge of the regulations, and its awareness of the legal requirements it violated. *Id*. Here, Ms. Tartaglia determined that a 25 percent increase in the gravity-based penalty was warranted due to Respondent's culpability. Trial Tr. vol. 2, 75–76.

As Ms. Tartaglia explained, EPA personnel repeatedly contacted Respondent and explained to it how to comply with the RRP Rule. Trial Tr. vol. 2, 43–76. Respondent acknowledged that it understood the RRP Rule requirements, Trial Tr. vol. 2, 11–13, but failed to comply anyway. Accordingly, Respondent had knowledge or the regulations and the legal requirements it violated.

During the hearing, Ms. Tartaglia discussed how often EPA attempted to contact Respondent and help it come into compliance with the law. Trial Tr. vol. 2, 43–76; *Id*. at 44 (Ms. Tartaglia: "I had overwhelming evidence showing the number of times EPA reached out to [Mr. von Marees] to come into compliance with the RRP Rule. It goes all the way back to 2015.").

Prior to the July 25, 2018 inspection, Complainant contacted Respondent numerous times via both letter and telephone calls to explain the RRP Rule requirements. *See* CX 80–85. Complainant invited Respondent to attend at least three recordkeeping inspection with Complainant, so that Complainant's inspectors could further explain the RRP Rule requirements. Trial Tr. vol. 2, 45; CX 80-85, 92. Each time Complainant attempted to schedule an inspection, it would send a letter to Respondent and then follow up with phone calls. Trial Tr. vol. 2, 45–46 (Ms. Tartaglia: [EPA] send these letters and then also follow up with a phone call. [Mr. Futerman] Okay, so each time EPA sends a letter, does it always follow up with a phone call? [Ms. Tartaglia] Yes.").

Respondent admitted to receiving EPA's letters and the telephone calls but still failed to show up for any of those inspections. *See* CX 05, 06, 83, 84. Mr. von Marees's reason for disregarding the inspections: he receives too many letters and phone calls and his wife—a co-owner in the business—told him to ignore the ones from the EPA. Trial Tr. vol. 2, 126–27. He thought it was awkward and strange to meet the inspectors at a hotel conference room, so he decided to ignore them. *Id*. at 127.

After Respondent failed to show up for three inspections, Ms. Tartaglia decided to call Mr. von Marees and have a detailed conversation with him about the RRP Rule. Trial Tr. vol. 2, 7–8. This was not a typical practice, but she decided to call Respondent because of the

"[n]umerous times we've been trying to contact and schedule an inspection with him and he failed to show up." *Id*. at 10–11.

On April 12, 2018, Ms. Tartaglia called Respondent and spoke with Mr. von Marees. *Id*. at 11, 13 (Ms. Tartaglia: "I introduced myself, and I asked specifically for Mr. Rodrigo von Marees, and he answered the phone."). After explaining who she was and why she was calling, *id*., Ms. Tartaglia detailed the precise requirements of the RRP Rule. *Id*. at 12–13. Mr. von Marees told Ms. Tartaglia that he understood the legal requirements and would comply with the RRP Rule. Trial Tr. vol. 2, 13 (Mr. Tartaglia: "There was one point during the conversation I asked him [Mr. von Marees] if he understood the RRP rule requirements and also – he responded yes. And then I proceeded to ask him are you going to continue to work on pre-1978 home[s]. And he responded to me by saying no, not until he gets the certifications.").

Ms. Tartaglia was also clear that Respondent needed to be EPA Firm certified before it could even obtain a building permit for work to be done in a pre-1978 house:

> Judge Biro: How would he know not to pull a permit before he had his certification…?
>
> [Ms. Tartaglia]: Well, when we made an initial contact with him back in 2015, 2017 and 2018, we spoke to him each time and talked about the RRP rule requirements. We emphasized to him that before he can pull a permit on a pre-1978 home he needed these two certifications to be in compliance with the RRP rule.
>
> So at the time when I spoke with him, he understood what I said. . . .
>
> Judge Biro: So this was – you were clear that he needed it even to pull the permit, regardless of whether he was doing the renovation or before the renovation, he needed it just to pull a permit?
>
> [Ms. Tartaglia]: Well, so, the rule says, even before you can perform or offer to perform, you must be firm certified to do any kind of renovation work. So that means, when he pulled the permit he should have been firm certified.
>
> * * *

> Mr. Futerman: Ms. Tartaglia, when you had the telephone conversation with Mr. von Marees, do you remember specifically telling him that before he can obtain a permit, before he can pull a permit, he has to be EPA firm certified?
>
> [Ms. Tartaglia]: Yes.

Trial Tr. vol. 2, 119–21.

On April 25, 2018, Ms. Tartaglia sent Respondent an advisory letter as a follow-up to the April 12, 2018 telephone conversation. Trial Tr. vol. 2, 13; CX 85. The letter reminded Respondent of the RRP Rule requirements and advised it to obtain EPA firm certification and renovator certifications prior to working on pre-1978 residential property. *Id*.

Despite these multiple warnings from Complainant, Respondent did not get EPA firm certified and continued to obtain building permits on pre-1978 houses. *See e.g.,* CX 10. So, on July 25, 2018, Mrs. Farnham and Mr. Hamlet went to Respondent's job site and performed an unannounced worksite inspection. Trial Tr. vol. 2, 20–22; CX 7. As part of that inspection, Ms. Farnham had a detailed conversation with Mr. von Marees about Respondent's duties under the RRP Rule. CX 7; Trial Tr. vol. 1, 79.

Then on July 30, 2018, just five days after the in-person inspection and before it obtained EPA firm certification, Respondent obtained another building permit at a pre-1978 house—thereby offering or claiming to perform a renovation in target housing without EPA firm certification. Trial Tr. vol. 2, 73, 74–75 (Ms. Tartaglia: "five days after our EPA inspector showed up at this work site and talked to [Mr. von Marees] about the renovator requirements he pulled another building permit on a pre-1978 home… [Mr. Futerman] are you saying that as a result of pulling this building permit five days after the EPA inspected Respondent at the

Turnagain property the Respondent committed another violation of the RRP Rule? [Ms. Tartaglia] Yes, that's correct."); CX 87, 88, 11.[3]

Respondent's ongoing noncompliance despite repeated attempts by Complainant to educate Respondent on the RRP Rule requirements shows that Respondent disregarded the information provided to it by Complainant's inspectors, including Ms. Farnham and Ms. Tartaglia. Respondent admitted that he received EPA's letters and telephone calls, Trial Tr. vol. 2, 126–27, Respondent told Ms. Tartaglia that he understood the RRP Rule's requirements, Trial Tr. vol. 2, 13, but Respondent continued to violate the law. Respondent disregarded Complainant's repeated warnings and continued to offer, perform, or claim to perform renovation work on pre-1978 residential properties. Therefore, Ms. Tartaglia determined that a 25 percent upward adjustment to the gravity-based penalty was appropriate based on Respondent's culpability. Trial Tr. vol. 2, 75–76.

d. Other factors as justice may require

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

Here, Complainant is not aware of any factors that would warrant adjustment of the penalty based on other factors as justice may require, and as such Ms. Tartaglia did not adjust the penalty based on this factor. Trial Tr. vol. 2, 102.

* * *

[3] *See also* 40 C.F.R. § 745.81(a)(2)(ii) (no firm may perform, offer, or claim to perform renovations without EPA firm certification in target housing).

Based on Ms. Tartaglia's consideration of the nature, circumstances, extent, and gravity of the violations and, with respect to the Respondent, its ability to pay, effect on ability to continue in business, any history of prior such violations, the degree of culpability, and such other matters as justice may require, Complainant respectfully offers that $25,609 is an appropriate penalty for Respondent's four violations of TSCA § 409 and the RRP Rule, as depicted below:

Violation	Circumstance	Extent	40 C.F.R. Part 745	Penalty
Count 1	3a	Minor	745.81(a)(2)(ii)	$4,500
Count 2	3a	Minor	745.89(d)(1)	$4,500
Count 4	2a	Minor	745.85(a)(2)(ii)(C)	$6,000
			Gravity-Based Penalty	$15,000
			Inflation Adjustment (Gravity-Based Penalty x 1.08203)	**$16,230**
Count 3	1b	Minor	745.85(a)(1)	$2,580
			Gravity-Based Penalty	$2,580
			Inflation Adjustment (Gravity-Based Penalty x 1.64990)	**$4,257**
			Total Inflation-Adjusted Gravity-Based Penalty	**$20,487**
			Culpability Factor (25% of the inflation adjusted Gravity-Based Penalty)	$5,122
			TOTAL	**$25,609**

B. The Proposed Penalty Appropriately Accounts for the Potential Risk to Human Health Caused by Respondent's Actions

Complainant's proposed penalty is calculated to account for the potential harm and risk to human health caused by Respondent's actions.

Lead is an extremely dangerous substance than can cause serious and deleterious effects, especially in young children. When passing the 1992 Residential Lead-Based Paint Hazard Reduction Act, Congress determined that the heath and development of children is endangered by chipping or peeling lead paint or excessive amounts of lead-contaminated dust in their homes, and that the danger posed by lead-based paint hazards can be reduced by abating lead-based paint or by taking interim measures to prevent paint deterioration and limit children's exposure to lead dust and chips. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No.

102-550, 106 Stat. 3672 (codified as amended in scattered sections of 12, 15, and 42 U.S.C.); CX 100 at 179.

Similarly, in promulgating the RRP Rule, EPA spoke at length about the dangers of lead. *See Lead; Renovation, Repair, and Painting Program*, 73 Fed. Reg. 21692-01 (Tuesday, April 22, 2008); CX 102. EPA noted that "lead has been demonstrated to exert 'a broad array of deleterious effects on multiple organ systems via widely diverse mechanisms of action' . . . includ[ing] neurological development and function; reproduction and physical development; kidney function; cardiovascular function; and immune function." *Id*. EPA then went on to discuss, among other things, the neurotoxic effects that lead shows in children, the neurocognitive decrements associated with relatively low blood lead concentrations in young children, associations between lead exposure and deleterious cardiovascular outcomes, and sensory, motor, cognitive, and behavioral impacts associated with lead neurotoxicity in childhood. *Id*. It noted that "effects of lead on neurobehavior have been reported with remarkable consistency across numerous studies of various designs, population studies, and developmental assessment protocols." *Id*.

As Ms. Farnham explained:

> Lead exposure has serious consequences for the health of the children. Our rules are definitely geared towards children, protecting the children. …
>
> At high levels, lead attacks the brain and central nervous system, causing coma, convulsions, and yes, even death. It has – it can affect children's brain development, lowering their IQ, reduce attention deficit, increase antisocial behavior, reduce educational attainment, anemia, damage their kidneys, decrease bone and muscular growth, affect their reproductive organs…
>
> If a pregnant woman is exposed to lead, the lead can pass through the placenta into the baby's developing bones and other organs. High levels can cause miscarriage and stillbirth. It can cause the baby to be born too early or too small. It can hurt the baby's brain, kidneys, and nervous system, cause the child to have learning or behavioral problems.

Trial Tr. vol. 1, 27–29.

Accordingly, the RRP Rule is designed to minimize exposure to lead and lead-based paint. As EPA explained

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

73 Fed. Reg. at 21694.

And as Ms. Farnham clarified:

> [T]he whole purpose of the RRP rule is to protect the general public, to protect the workers, and especially to protect the family members that may actually be living in that house. And if they have children present … the requirement is to protect especially the children under the age of 6 from possibly getting lead poisoned.
>
> Trial Tr. vol. 1, 54.

Of particular concern in this case, is the fact that Respondent failed to cover the ground with impermeable materials and instead allowed paint chips to be deposited onto the Turnagain Property's bare soil.

> Q [by Ms. Meinhardt] And Ms. Farnham, would you please tell us what we see on the ground here?
>
> A [by Ms. Farnham] And once again, those are paint chips on the bare ground next to the foundation of the house.
>
> Q And so again, do you have an independent memory of seeing these paint chips on the ground? Or do you just think that's what the photo is showing?
>
> A No, I remember seeing it when I was there.
>
> * * *
>
> Q Okay. And tell us why you're concerned, though, about there not being containment and these paint chips being on the bare ground?

A For – for EPA, the whole purpose of the RRP rule is to protect the general public and also to protect the potential homeowner that could be moving into that house that most likely would have a child under the age of 6 moving into that house. And when there's paint chips all over the ground, there's the potential of lead poisoning for the family that could potentially move in.

Q Okay. So even though there aren't any children present at the renovation right now, you're saying there's a risk there?

A Yes.

Q Okay. Did you have any evidence to suggest that this was lead-based paint at the Turnagain Street?

A No, as inspectors, we presume that it's positive for lead unless the certified renovator has made a determination that there is no lead present.

Trial Tr. vol. 1, 101–02; 107–08.

By failing to cover the ground with impermeable material and allowing paint chips to be deposited on the bare ground of the Turnagain Property, Respondent created an exposure pathway whereby anyone moving into the house after the renovation is completed could be exposed to lead-based paint. Though Respondent argued that it tested portions of the Turnagain property for the presence of lead, *see, infra,* Section III(A), Respondent admitted that it did not test the Turnagain Property's eaves, where these white paint chips came from. Trial Tr. vol. 2, 167–68; CX 22 (photograph of a worker power washing the white painted eaves of the Turnagain Property).

Respondent's actions, therefore, created a risk to human health. This risk is even more severe when considered in light of Respondent's other violations. By failing to post warning signs, Respondent also failed to notify anyone in the surrounding area that by entering the worksite they may be putting themselves at risk of lead poisoning. The combination of allowing paint chips to be strewn about the Turnagain Property, without proper warning signs in place, thereby created a serious risk to human health.

III. RESPONDENT FAILED TO SHOW THAT ANY OF ITS COUNTERARGUMENTS WARRANT A REDUCED OR ELIMINATED PENALTY

To counter Complainant's case-in-chief, Respondent offered three main arguments. First, Respondent appeared to argue that because Mr. von Marees tested the Turnagain Property for the presence of lead, no penalty should be assessed here as there was no appreciable harm. Second, Respondent argued that because a representative of GreenBuild received training from the State of Alaska, no penalty should be assessed. And third, Respondent argued that because Ms. Farnham told Respondent that it would receive a warning, a warning should be issued instead of a penalty. This Court should disregard each of Respondent's arguments as meritless and instead find that the proposed penalty appropriately accounts for the potential risk to human health that Respondent's violations caused.

A. Respondent's Purported Lead Test Does Not Indicate That a Reduced Penalty is Warranted

Throughout this process, Respondent has argued that the RRP Rule does not apply to its renovation of the Turnagain Property because Mr. von Marees tested the property for the presence of lead and those tests came back negative. *See, e.g.,* Trial Tr. vol. 2, 142–43 (Mr. von Marees: "When I took that property I told the owner, I'm going to make some tests. I don't want to jeopardize any of my workers, especially with lead…. I did four tests on that property….And that test was negative."). 40 C.F.R. § 745.82(a)(2) provides that 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." This Court correctly determined that "Respondent cannot avail itself of this exception…[because] the exception

applies only to tests performed by a *certified* renovator" and Mr. von Marees was not a certified renovator when he purportedly tested the Turnagain Property. Order on Motion for Accelerated Decision at 14.

As it relates the appropriate penalty in this matter, Respondent's argument implies that it should be reduced or eliminated because there is no potential for harm, as the lead check tests came back negative. This argument is meritless because (1) Respondent failed to test the Turnagain Property's eaves, where the paint chips came from; (2) Mr. von Marees demonstrated that he does not know how to properly conduct a lead check test, and (3) Respondent demonstrated that it does not understand the legal requirements for testing.

1. Respondent failed to test the Turnagain Property's eaves

First and foremost, any lead check testing that the Respondent purportedly conducted on the Turnagain Property is immaterial to this matter because Mr. von Marees admitted that he did not test the Turnagain Property's eaves and it was those eaves that were the source of the paint chips that were deposited on the bare ground.

During his cross examination, Mr. von Marees agreed that he did not touch—i.e., did not perform a lead check test on—the Turnagain Property's eaves:

> Q [By Mr. Futerman] Okay. So can we confirm what the four areas that you tested were?
>
> A [By Mr. von Marees] Window, door, drywall ceiling, the floor.
>
> * * *
>
> Q And you did not test anywhere on the trim between the wall and the roof of the property?
>
> A There were no trims.
>
> Q I mean I don't know what the right construction word is, the eves, the soffits, the white piece of wood between the wall and between the roof? I can show you a picture if you want.
>
> A There was none.

* * *

Mr. Futerman: Mr. Crawley, can we look at CX 43, please?

Q. Yes, Mr. von Marees, this white piece of wood, this white area between the roof and the wall?

A We did not touch that. We did not touch that. We just put all new siding on top.

Trial Tr. vol. 2, 166–68; CX 43.[4] *But see* CX 22 (photograph of Respondent's worker power washing the white eaves of the Turnagain Property). It is these eaves that were the source of the white paint chips that were deposited on the bare ground of the Turnagain Property. *See* CX 43 (photograph depicting the white eaves of the Turnagain Property, showing that paint had been removed); CX 35–36, 39–40 (photographs depicting white paint chips on the bare ground of the Turnagain Property); Trial Tr. vol. 1, 100–107 (Ms. Farnham discussing that she observed white paint chips on the bare ground of the Turnagain Property).

The law presumes the presence of lead in target housing until firms prove otherwise. 40 C.F.R. §§ 745.82(a)(2), 745.87(e); Trial Tr. vol. 1, 69. ("[Ms. Farnham:] EPA says that there is lead present unless a certified individual has tested it to prove otherwise."). Ms. Farnham observed paint chips deposited on the bare ground at the Turnagain Property. *See e.g.*, Trial Tr. vol. 1, 101–07. Mr. von Marees admitted that Respondent did not test the Turnagain Property's eaves, the part of the property where the paint chips came from. Trial Tr. vol. 2, 167–68; CX 43. And Ms. Farnham explained that the paint chips that were all over the Turnagain Property were a potential pathway for lead exposure that existed after Respondent's renovation. Trial Tr. vol. 1, 101–02; 107–08; *Supra*, Section II(B).

Therefore, Respondent's implication that there is no appreciable harm present here is meritless. Respondent's actions caused paint chips—which the law presumes to contain lead—to

[4] *See also* Trial Tr. vol. 2, 164–66 (Mr. von Marees providing contradictory statements about which components he tested).

be deposited onto the bare ground, potentially exposing future residents of the Turnagain Property to lead.

2. Mr. von Marees demonstrated that he does not know how to properly conduct a lead check test

Second, Mr. von Marees' own testimony indicated that he does not know how to properly conduct a lead check test. Mr. von Marees stated that he was the individual who tested the Turnagain Property for the presence of lead. Trial Tr. vol. 2, 142–43. But in response to a question posed by Judge Biro, Mr. von Marees incorrectly explained how a lead check test should be performed:

> Mr. Von Marees: It's a very simple test. 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. Its very simply.
>
> The sponge wets the paint and then there is a little card which gives you the results. Very, very easy.
>
> It's the same test EPA uses. And when they show me it was here in the – it's the same test that they focused on here in one of the pages of evidence….
>
> CX 105. 105. That's exactly the same.

Trial Tr. vol. 2, 147– 48.[5]

That is not how a lead check test is performed. Beyond the fact that there is no bottle into which you put a piece of paint,[6] as this Court already determined that "the card photographed in RX 1 is not a lead test result at all but rather a confirmation test card used to determine whether

[5] The "little card" that Mr. von Marees refers to is depicted in Respondent's sole exhibit, RX 1, which Respondent did not have admitted into evidence during this hearing.

[6] *See* Complainant's Memorandum in Support of the Motion for Accelerated Decision at 29 (citing CX 105 (3M Lead Check Swab Instruction Manual, available at, https://www.doh.wa.gov/Portals/1/Documents/ 4000/LeadCheck_Swab_Manual.pdf)). "The certified renovator must then activate the Lead Check Test swab by squeezing the internal ampules with enough pressure to ensure that they break, so the reagent liquids inside of the swab are able to mix and so the reagent liquid wets the end of the swab. *Id*. The certified renovator then must firmly rub the wet tip of the Lead Check Test swab across the gouged painted surface, continually squeezing the sides of the tube so that the tip remains wet. If the test detects the presence of lead, the swab tip and/or test surface will turn pink or red." *Id*.

the active reagent in the lead test is working property. The 3M Lead Check Swabs Instruction Manual contains a diagram identical to the test confirmation card in RX 1 and states that it should be used to confirm a negative result." Order on Motion for Accelerated Decision at 14, (citing CX 105, RX 1).[7]

That Mr. von Marees believes RX 1 "gives you the results," Trial Tr. vol. 2, 147– 48, indicates that he does not know how to use a lead check test correctly. Yet Mr. von Marees has asserted that he knows how to properly perform the lead check tests and that they are very easy. *Id*. And Mr. von Marees has been conducting renovations on target properties for years. *See e.g.,* CX 85; Trial Tr. vol. 2, 17–18 (Ms. Tartaglia discussing the building permits that Respondent obtained on pre-1978 homes). Mr. von Marees has asserted, though offered no proof to support the assertion, that he has taken the EPA renovator certification class and is now a certified renovator. Trial Tr. vol. 2, 130 (Mr. von Marees: "I spent a week in training. Where I learned a lot."). But somehow Mr. von Marees still does not understand that the confirmation card depicted in RX 1 is *not* a lead check test result.

If Mr. von Marees has been performing lead test checks the way he described during his testimony, then each of his test results was invalid. This suggests that every renovation in target housing that Respondent has ever conducted were all subject to TSCA and the RRP Rule, as lead is presumed to exist in such housing unless established otherwise. 40 C.F.R. §§ 745.82(a)(2), 745.87(e). This also indicates that any argument related to the results of the lead check tests that

[7] CX 105, the 3M Lead Check Swab Instruction Manual, was not admitted into evidence in this matter. Complainant does not cite to it here in an attempt to have this Court substantively rely on it but rather to show that this Court has already found that the "little card" Mr. von Marees refers to is not the results of the lead check test but rather the confirmation card to show that the test vials were operational.

Mr. von Marees performed on the Turnagain Property is meritless because those tests were not performed properly and therefore the results are invalid.

3. Respondent misstated the legal requirements of 40 C.F.R. § 745.82(a)(2)

Similarly, in response to questioning by Mr. Futerman, Mr. von Marees misstated the legal requirements for tests:

> Q: Okay. So you couldn't have tested every window if you conducted four tests. So which window did you test, which ceiling did you test, et cetera?
>
> A. In every project that you see that all the windows are the same you don't need to test all the windows. If all the windows are the same you only test one. The doors, same.

Trial Tr. vol. 2, 164–65.

This is incorrect and there is no support for the assertion that if the windows or doors appear the same, a certified renovator only has to test one window or one door. For 40 C.F.R. § 745.82(a)(2) to apply, a certified renovator must, *inter alia*, test "*each* component affected by the renovation." 40 C.F.R. § 745.82(a)(2) (emphasis added). The regulations do provide that "[i]f the components make up an integrated whole, such as the individual stair treads and risers of a single staircase, the renovator is required to test only one of the individual components, unless the individual components appear to have been repainted or refinished separately." *Id*. But testing one individual tread within a single staircase is a far cry from testing one window in an entire house.

Mr. von Marees admitted to only conducting four lead check tests on the Turnagain Property. Trial Tr. vol. 2, 164–67. But, as this Court has already found, four tests is "an insufficient number of swabs to test *each* of the painted surfaces…affected by the renovation." Order on Motion for Accelerated Decision at 14 (citing 40 C.F.R. § 745.82(a)(2)(emphasis in original)).

After years of EPA trying to explain the RRP Rule requirements to Respondent, after the classes that Mr. von Marees purportedly took, and after years of negotiating and then litigating this matter, Respondent demonstrates that it still does not understand the basic requirements of the RRP Rule.

* * *

Therefore, this Court should disregard Respondent's argument that a penalty reduction is merited due to the lead check tests Respondent performed on the Turnagain Property. Respondent failed to check each component of the Turnagain Property and does not know how to properly conduct such a test in the first place. Therefore, any argument related to those tests is immaterial as the alleged results of those tests are invalid.

B. The Training that Respondent Allegedly Completed is Irrelevant to this Matter

Respondent also implied that the penalty should be reduced because it was trained by the State of Alaska. This argument is unsupported and irrelevant.

During his direct examination, Mr. von Marees stated "the municipality in the State of Alaska wants all contractors to have licenses in asbestos and lead. Which is one of the trainings that *I* did previously when EPA contacted me." Trial Tr. vol. 2, 138 (emphasis added). In response to questioning by Judge Biro, Mr. von Marees confirmed:

> [Mr. von Marees:] the State of Alaska and the municipality of Anchorage wants you to be certified.
>
> * * *
>
> [Q] When you did the work on the Turnagain Property, did *you* have a state of Alaska lead renovator certificate?
>
> Mr. von Marees: Yes.
>
> Judge Biro: Or municipality certificate?
>
> Mr. von Marees: Yes.

Trial Tr. vol. 2, 144–45 (emphasis added).

First, even if Mr. von Marees was actually certified by the municipality of Anchorage, that would be irrelevant. 40 C.F.R. § 745.83 defines a certified renovator for the purposes of the RRP Rule as "a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal program." It is undisputed that no one from Respondent completed an EPA-accredited renovator course prior to Respondent's work on the Turnagain Property.[8] And the State of Alaska is not an EPA-authorized state. *See* 40 C.F.R. Part 745 Subpart Q. So even if Mr. von Marees had been certified by the municipality of Anchorage or the state of Alaska, that would be irrelevant for the purposes of the RRP Rule.

But after stating that he was certified by Anchorage, Mr. von Marees later changed his story and stated that it is his wife, Mrs. von Marees, who was certified by Anchorage: "My wife has it in her file. She is the one that did the training. She is certified…." Trial Tr. vol. 2, 145.

Any trainings held by Mrs. von Marees are immaterial. While Mrs. von Marees "is [a] partner in the company," Trial Tr. vol. 2, 145, and helps with the paperwork such as creating invoices, Trial Tr. vol. 2, 163, it was Mr. von Marees who was at the Turnagain Property overseeing the renovation work, performing the lead check tests, and directing the renovation. So, it was Mr. von Marees who needed to be renovator certified. *See* 40 C.F.R. § 745.81(a)(3) ("all renovations must be directed by renovators certified in accordance with § 745.90(a) and performed by certified renovators or individuals trained in accordance with § 745.90(b)(2)").

Moreover, Mr. von Marees raised the issue of state certifications in an attempt to show that he knew how to properly perform the lead check tests. Trial Tr. vol. 2, 146–48. Mr. von Marees asserted that Mrs. von Marees was trained by Anchorage on how to conduct the lead

[8] *See, e.g.*, Trial Tr. vol. 2, 169 (Mr. Futerman: "But prior to your work on the Turnagain Property you, yourself, were not certified by anyone about these lead tests? A [Mr. von Marees] I was not certified for EPA.").

check tests, and she taught him. *Id*. But, as established above, Mr. von Marees demonstrated that he does not know how to properly perform the lead check tests.

C. Ms. Farnham Did Not Provide Respondent a Warning, and Even if She Did, it Would be Irrelevant to this Matter

Finally, Respondent asserted that during the inspection, Ms. Farnham told it that the violations she observed would only result in a warning. *See e.g.,* Trial Tr. vol. 2, 133 (Mr. von Marees: "[Ms. Farnham] said that this was just going to be a warning for me."). This is untrue; Ms. Farnham did not provide Respondent a warning and Respondent has not provided proof to the contrary. But even if Ms. Farnham had provided Respondent a warning, that would be irrelevant for the purposes of this matter.

Ms. Farnham did not provide Respondent a warning. In response to questioning from Mr. von Marees, Ms. Farnham explained: "I do not make the determination for the violations as an inspector. And I do not in the field have the right to give anybody a warning. In the TSCA program we don't have warnings." Trial Tr. vol. 1, 140. That exchange continued:

> Judge Biro: . . . did you suggest to Mr. von Marees that he would receive a warning for the violation rather than a penalty?
>
> [Ms. Farnham:] No. I would never do that as an inspect[or] out in the field.

Trial Tr. vol. 1, 141.

During redirect examination, Ms. Farnham further clarified that she does not have the authority to issue a warning:

> Q [by Ms. Meinhardt:] Okay. At the inspection did you provide him [Mr. von Marees] a warning and tell him there would be no penalty in this case?
>
> A [by Ms. Farnham:] No.
>
> Q Do you have authority to issue field citations under TSCA?
>
> A No, we do not.
>
> Q Do you make determinations as to whether a violation has occurred while you're out doing an inspection?

A Not as an inspector, no.

. . . .

Q Okay. Do you decide whether a renovator who appears to be out of compliance with TSCA will be assessed a penalty?

A No.

Q And do you tell people that they may be charged a penalty if they are found[] in violation of TSCA and the RRP rule?

A No.

Trial Tr. vol. 1, 158–59. As Ms. Tartaglia later explained, that authority lies with the compliance officer:

Q [By Mr. Futerman] Okay, are there any sort of like formal warnings or things of that nature that you could do?

A [By Ms. Tartaglia] Yes. We could issue a – an advisory letter or a notice of non-compliance.

Q . . . What does that look like? What's a notice of non-compliance?

A A notice of non-compliance is typically a first-time violator, and it's a minor violation if – and we give them an opportunity to come into compliance with the RRP Rule.

Q Okay, and what is that? Is that just a letter that you send or is that – how do you communicate with the respondent that you're giving them this warning?

A We issue a letter to the respondent.

Trial Tr. vol. 1, 204–05.

But Respondent's violations were not eligible for such a warning. As Ms. Tartaglia explained:

Q [By Mr. Futerman] Ms. Tartaglia, after reviewing CX 7 [the inspection report], did you – what did you conclude about – about whether any violations occurred?

A [By Ms. Tartaglia] When reviewing the case, I concluded that there were – RRP violations.

* * *

Q And Ms. Tartaglia, those last two violations, violations 3 and 4, are they violations of the work practice standards that you talked about yesterday?

A Yes, they are.

> Q So what does that mean with respect to what type of case this was going to be?
>
> A Because work practice standard violations were involved, this was going to be a full penalty action case.
>
> Q Okay, what about the possibility of [a] warning? Was there any chance that you would have provided a warning instead of pursing an enforcement action here?
>
> A No, this was a formal inspection. Our inspectors showed up at the work site and witnessed those violations.

Trial Tr. vol. 2, 27–29.

In support of its argument that Ms. Farnham went outside of her authority and issued Respondent a warning, Respondent offers this Court no physical proof whatsoever. Absent from the record are any written documents, e-mails, or letters from Ms. Farnham explaining that she would be issuing Respondent a warning. Instead, Respondent relies on the self-serving testimony of its co-owner Mr. von Marees, *see e.g.,* Trial Tr. vol. 2, 133 (Mr. von Marees: "[Ms. Farnham] said that this was just going to be a warning for me"), and of its employer, Mr. Paul Maple.

> Mr. von Marees: Paul, do you remember what [Ms. Farnham] told me that day when we were speaking?
>
> * * *
>
> [Mr. Maple]: If I remember right it's that, we were getting off with a warning and that if, I believe, it was if she got a hold of, like, all our sub-information or something like that that it would just be that, just a warning.

Trial Tr. vol. 2, 185–86.

But Mr. Maple's testimony is deficient in several respects. Beyond the fact that Mr. Maple is an intermittent employee who indicated he may do more work for Respondent in the future, Trial Tr. vol. 2, 187–88, Mr. Maple was unable to provide any details other than that he thought Respondent would be getting a warning.

> Q [By Ms. Meinhardt] Okay, thank you. You just mentioned that you heard something about EPA inspectors giving Greenbuild a warning, do you remember exactly what you heard?

A [By Mr. Maple] I do not, that was a long time ago. I do remember the conversation going back and forth and then the lady just saying that she would let it off as a warning.

Q Okay. And did you keep any notes from that day about what you heard?

A No, why would I?

Trial Tr. vol. 2, 188–90.

Further, when Mr. von Marees and Ms. Farnham were speaking, Mr. Maple was on a ladder, actively working on the house. While Mr. Maple asserted that he was within earshot of the conversation, he also admitted that he continued to work on top of a ladder throughout that conversation. Trial Tr. vol. 2, 190. *But see*, Trial Tr. vol. 2, 131–33 (Mr. von Marees: "Agent Kim never walked around the house, she was right next to me the whole time in front of my pickup truck….so the picture is CX 21. You can see the front of my pickup truck…. Which shows that my pickup truck is very seperated from the area of construction. That's why I want to point out to you that [Ms. Farnham] was always next to me. Next to my pickup truck.").

Respondent can't have it both ways: Respondent can't argue that Mr. von Marees and Ms. Farnham spoke so far away from the house that there is no way Ms. Farnham was able to observe the condition of the property, *see* Trial Tr. vol. 2, 131–33, but somehow close enough that Mr. Maple was able to overhear their conversation while on top of a ladder. Trial Tr. vol. 2, 188–90.

Moreover, even if Respondent had been given a warning by Ms. Farnham, that would be irrelevant to this matter. Even if Ms. Farnham had told Respondent that it would only receive a warning, that does not bind Complainant. As Ms. Tartaglia explained, the decision about whether to assess a penalty for violations of TSCA and the RRP Rule and authority to issue a warning rests with the case developer and EPA management. *See* Trial Tr. vol. 1, 202–05; Trial Tr. vol. 2, 27–29. Complainant is unaware of, and Respondent fails to offer, any legal support for the notion

that if an inspector verbally tells a respondent that it will be getting a warning, that would prevent the agency from overruling that decision as issuing a violation instead. This is especially true where, as here, just five days after the inspection, the respondent committed another violation of the underlying law. Trial Tr. vol. 2, 73, 74–75; CX 87, 88, 11.

IV. CONCLUSION

This Court should order Respondent to pay a penalty in the amount of $25,609 for its four violations of TSCA and the RRP Rule. Complainant met its burden to show that its proposed penalty of $25,609 is reasonable and properly accounts for the potential harm to human health and the environment caused by Respondent's violations. Respondent failed to show that its counterarguments indicate otherwise because each is meritless, irrelevant, or unsupported by the evidence. Therefore, Complainant request that this Court order Respondent to pay $25,609 for its four violations of the TSCA and the RRP Rule.

Respectfully submitted,

ANDREW FUTERMAN
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Date: 2022.07.08 15:19:11 -05'00'

Andrew Futerman,
Counsel for Complainant
EPA Region 10

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Initial Post-Hearing Brief**, dated July 8, 2022 was served on the following parties in manner indicated below:

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

Copy by Electronic Mail to:
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GreenBuild Design & Construction, LLC
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For Respondent

Dated: July 8, 2022
Chicago, Illinois

Respectfully submitted,

ANDREW FUTERMAN
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_____
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