

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
LHP, LLC)	Docket No. TSCA-07-2014-0029
130 N. 27th Street, #6)	
Lincoln, Nebraska)	
)	
Respondent)	

**COMPLAINANT'S INITIAL
PREHEARING EXCHANGE**

Comes now the United States Environmental Protection Agency, Region 7 (EPA or Complainant), and in response to the Prehearing Order issued in this matter, respectfully submits Initial Prehearing Exchange, stating as follows:

1.(A) WITNESSES INTENDED TO BE CALLED

Paul Clark: Mr. Clark will testify as a fact witness. Mr. Clark is a participant in the Senior Environmental Employment Program assisting EPA by performing inspections under the EPA Lead-Based Paint Renovation, Repair and Painting Rule (RRP) program. He will testify as to his prior work experience as a police officer with the Kansas City, Missouri Police Department, in which his duties included taking witness statements and writing police reports. He will testify as to his training and credentials as an inspector by EPA. He will testify as to his work experience at EPA, and in conducting RRP work practice inspections, including taking photographs of work sites, taking witness statements, and writing inspection reports. He will testify about conducting a work site inspection on November 9, 2012 of Respondent's work practices at a target housing property at 800 A Street, Lincoln, Nebraska. He will testify to his observations of the work site during the inspection, statements made during the inspection, including his opinions regarding the truthfulness of the workers he interviewed and the probative value of their statements. He will testify to his collection and preservation of the evidence in the conduct of the inspection, and to his writing of the Inspection Report and Attachments (CX 1).

Candace Bednar: Ms. Bednar will testify as a fact witness. Ms. Bednar is Compliance Officer for the EPA Region 7. Her duties include serving as a compliance officer in the

investigation of RRP Rule violations under the Toxic Substances Control Act (TSCA). She will testify as to her prior work experience with the Missouri Department of Natural Resources, and her training and work experience with EPA. She will testify as to her review of the evidence compiled as a result of EPA's regulatory oversight of Respondent's renovation business, i.e., the Inspection Report and Attachments (CX 1), and the factual basis for her determination that Respondent is in violation of the TSCA and the regulations promulgated thereunder. She will testify as to how the penalty proposed in the referenced Complainant was calculated applying the statutory penalty factors set forth within Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), as explained in EPA's August 2010 Interim Final Policy entitled, "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (LBP Consolidated ERPP). She will offer her opinion regarding the appropriateness of the penalty proposed in the Complainant, considering the nature, circumstances, extent and gravity of the violations, and with respect to the Respondent: a) its ability to pay, b) the effect on its ability to continue to do business, c) any history of prior violations, d) the degree of culpability, and e) such other matters as justice may require. Ms. Bednar may testify further as to the requirement to bring Respondent into compliance with TSCA regulations.

1.(B) DOCUMENTS AND EXHIBITS INTENDED TO BE INTRODUCED

Copies of documents and exhibits which Complainant intends to introduce into evidence at the hearing are herein submitted electronically using the OALJ E-Filing System, except that due to the large size of the files, the photographic exhibits CX 3 through CX 39 are submitted as electronic files on a compact disc which has been simultaneously filed by personal delivery, courier, or commercial delivery service.

CX 1: Inspection Report and attachments for the November 9, 2012, inspection conducted by Mr. Paul Clark at 800 A Street, Lincoln, Nebraska.

CX 2: Transmittal letter for mailing Inspection Report to Respondent.

CX 3: Inspection Report Photograph on CD Disc; DSCN0233.jpg

CX 4: Inspection Report Photograph on CD Disc; DSCN0234.jpg.

CX 5: Inspection Report Photograph on CD Disc; DSCN0235.jpg.

CX 6: Inspection Report Photograph on CD Disc; DSCN0236.jpg.

CX 7: Inspection Report Photograph on CD Disc; DSCN0237.jpg.

CX 8: Inspection Report Photograph on CD Disc; DSCN0238.jpg

CX 9: Inspection Report Photograph on CD Disc; DSCN0239.jpg.

- CX 10: Inspection Report Photograph on CD Disc; DSCN0240.jpg.
- CX 11: Inspection Report Photograph on CD Disc; DSCN0241.jpg.
- CX 12: Inspection Report Photograph on CD Disc; DSCN0242.jpg.
- CX 13: Inspection Report Photograph on CD Disc; DSCN0243.jpg.
- CX 14: Inspection Report Photograph on CD Disc; DSCN0244.jpg.
- CX 15: Inspection Report Photograph on CD Disc; DSCN0245.jpg.
- CX 16: Inspection Report Photograph on CD Disc; DSCN0246.jpg.
- CX 17: Inspection Report Photograph on CD Disc; DSCN0247.jpg.
- CX 18: Inspection Report Photograph on CD Disc; DSCN0248.jpg.
- CX 19: Inspection Report Photograph on CD Disc; DSCN0249.jpg.
- CX 20: Inspection Report Photograph on CD Disc; DSCN0250.jpg.
- CX 21: Inspection Report Photograph on CD Disc; DSCN0251.jpg.
- CX 22: Inspection Report Photograph on CD Disc; DSCN0252.jpg.
- CX 23: Inspection Report Photograph on CD Disc; DSCN0253.jpg.
- CX 24: Inspection Report Photograph on CD Disc; DSCN0254.jpg.
- CX 25: Inspection Report Photograph on CD Disc; DSCN0255.jpg.
- CX 26: Inspection Report Photograph on CD Disc; DSCN0256.jpg.
- CX 27: Inspection Report Photograph on CD Disc; DSCN0257.jpg.
- CX 28: Inspection Report Photograph on CD Disc; DSCN0258.jpg.
- CX 29: Inspection Report Photograph on CD Disc; DSCN0259.jpg.
- CX 30: Inspection Report Photograph on CD Disc; DSCN0260.jpg.
- CX 31: Inspection Report Photograph on CD Disc; DSCN0261.jpg.

CX 32: Inspection Report Photograph on CD Disc; DSCN0262.jpg.

CX 33: Inspection Report Photograph on CD Disc; DSCN0263.jpg.

CX 34: Inspection Report Photograph on CD Disc; DSCN0264.jpg.

CX 35: Inspection Report Photograph on CD Disc; DSCN0265.jpg.

CX 36: Inspection Report Photograph on CD Disc; DSCN0266.jpg.

CX 37: Inspection Report Photograph on CD Disc; DSCN0267.jpg.

CX 38: Inspection Report Photograph on CD Disc; DSCN0268.jpg.

CX 39: Inspection Report Photograph on CD Disc; DSCN0269.jpg.

CX 40: Inspection Report Photograph on CD Disc; DSCN0270.jpg.

CX 41: Inspection Report Photograph on CD Disc; DSCN0271.jpg.

CX 42: Civil Penalty Assessment Worksheet.

CX 43: Records of the Lancaster County, Nebraska Assessors Office.

CX 44: Webpages of LHP, LLC.

CX 45: EPA Headquarters, Regional, and Divisional delegations.

**1.(C) APPROPRIATE PLACE OF HEARING; ESTIMATE OF TIME NEEDED
TO PRESENT DIRECT CASE; TRANSLATION SERVICES**

Complainant requests that the hearing in this matter be held at a suitable location in or near Lenexa, Kansas, where the EPA Region 7 offices are located. Complainant estimates it will need approximately four (4) hours to present its direct case. Complainant does not request any translation services.

**2.(A) NARRATIVE STATEMENT EXPLAINING FACTUAL/LEGAL BASES FOR
ALLEGATIONS DENIED OR OTHERWISE NOT ADMITTED IN ANSWER**

Complainant notes that the Complaint does not correctly number paragraphs in sequence, skipping from paragraph 33 to paragraph 36. In its Answer, Respondent sequentially numbered all paragraphs. This Narrative Statement follows the numbering sequence of the Complaint, not the Answer.

Jurisdiction

Paragraph 1: This paragraph informs Respondent of the statute and regulations Complainant alleges it has violated. The applicable statutes, regulations, and violations are described in detail in the Complaint as a whole. The Complaint was served on Respondent by the Lancaster County Sheriff's Office on February 19, 2015. Proof of Return of Service, dated March 3, 2015.

Paragraph 2: Absent any specific issue raised in the Answer, Complainant believes that the Complaint conforms to the requirements for the content of a Complaint under the Consolidated Rules. 40 C.F.R. § 22.14(a). A copy of the Consolidated Rules was provided with the Complaint. 40 C.F.R. § 22.14(b).

Parties

Paragraph 3: The EPA Administrator has delegated the authority to issue TSCA complaints to the EPA Regional Administrators. EPA Headquarters delegation 12-2-A. The Region 7 Regional Administrator has delegated that authority to the Region 7 Director, Water, Wetlands and Pesticides Division. Region 7 Regional delegation R7-12-002-A. The Region 7 Director, Water, Wetlands and Pesticides Division has delegated that authority to the Region 7 Chief, Toxics and Pesticides Branch. Region 7 Divisional delegation R7-DIV-12-2-A. CX 43. The Complaint was signed by the Region 7 Chief of the Toxics and Pesticides Branch, who has been duly delegated that authority from the EPA Administrator

Paragraph 4: Admitted by Respondent.

Statutory and Regulatory Background

Paragraphs 5-18: These Statutory and Regulatory Background paragraphs make no allegations with respect to the Respondent. The referenced regulations and statutes speak for themselves.

General Factual Allegations

Paragraphs 19-22: Admitted by Respondent.

Paragraph 23: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 28. Respondent's maintenance crew leader stated that on the day of the inspection he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The Respondent's maintenance crew leader stated to the EPA inspector on the day of inspection that the house was owned by Respondent and was to be rented. CX 1, p. 6. The Respondent's owner stated to the EPA inspector that the house was being readied to rent. CX 1, p. 6. Records of the Lancaster County, Nebraska Assessors Office show the Respondent owns over 50 housing properties. CX 43. Respondent maintains a webpage that it is engaged in the rental housing business. CX 44.

For purposes of the RRP rule, "compensation includes pay for work performed, such as that paid to contractors and subcontractors; wages, such as those paid to employees of contractors, building owners, property management companies, child-occupied facility operators, State and local government agencies, and non-profits; and rent for target housing or public or commercial building space." Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692, 21707 (Mar. 31, 2008) (Preamble to Final Rule). The Respondent performed the renovation of a rental property it owned in order to derive rent. Rent constitutes "compensation" within the meaning of the regulation.

Paragraph 24: The Respondent's maintenance crew leader consented to access for EPA to conduct the inspection, and signed a consent form to that effect. CX 1, p. 1, Attachment A p. 1. The inspection report was mailed to the Respondent on January 14, 2013. CX 2.

Paragraph 25: Respondent admits there were no children present on November 9, 2012; admits the property was constructed before 1978; and denies all remaining allegations in the paragraph. The Respondent's denial relates only to the allegation that "The Property was a circa 1908 residential property," and to the conclusion the Property is target housing as defined by 40 C.F.R. § 745.103.

"Target housing" means any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing), or any 0-bedroom dwelling. 40 C.F.R. § 745.103. The Property was identified by the Respondent's maintenance crew leader as a residential property, with no further qualification of the nature of the housing. CX 1 p. 6. The date of construction for the Property is 1908. CX 41. Based on the date of construction, and on Respondent's admission that the Property was constructed before 1978, the residential Property meets the definition of target housing as defined by 40 C.F.R. § 745.103. No exceptions to the definition of "target housing" were stated in the Answer, as "circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b).

Paragraph 26: The alleged violations are described in detail in the Complaint as a whole. Absent any specific issue raised in the Answer, Complainant believes that the Complaint conforms to the requirements for the content of a Complaint under the Consolidated Rules. 40 C.F.R. § 22.14(a).

Alleged Violations

Paragraph 27: The alleged violations are described in detail in the Complaint as a whole. Absent any specific issue raised in the Answer, Complainant believes that the Complaint conforms to the requirements for the content of a Complaint under the Consolidated Rules. 40 C.F.R. § 22.14(a).

Count One

Paragraph 28: Each and every Narrative Statement explaining factual/legal bases for allegations denied or otherwise not admitted the Answer is incorporated by reference herein.

Paragraph 29: The regulation at 40 C.F.R. § 745.85(a)(1) speaks for itself.

Paragraph 30: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 28. Respondent's maintenance crew leader stated on the day of the inspection that on that day he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The inspector on the day of the inspection did not see any warning signs. Respondent's maintenance crew leader stated that five warning signs had been taken down the day before the inspection. CX 1, p. 6. Photographs on the day of the inspection show no warning signs were posted. CX 7-11, CX 13, CX 15.

Paragraph 31: Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), by amending 40 C.F.R. Part 745, Subparts E and L (the "Renovation, Repair and Painting Rule" or the "RRP Rule"). Respondent's failure on the day of the inspection when renovation activities were ongoing to post signs or maintain the signs in place clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside of the work area violates the regulatory requirements of 40 C.F.R. § 745.85(a)(1). Respondent, therefore, violated Section 409 of TSCA, 15 U.S.C. § 2689.

Count Two

Paragraph 32: Each and every Narrative Statement explaining factual/legal bases for allegations denied or otherwise not admitted the Answer is incorporated by reference herein.

Paragraph 33: The regulation at 40 C.F.R. § 745.85(a)(2)(ii)(A) speaks for itself.

(Numbering skips in Complaint)

Paragraph 36: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 27. Respondent's maintenance crew leader stated on the day of the inspection that on that day he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The inspector on the day of the inspection observed an overhead garage door at the north rear of the residence that was raised, as well as an open door leading from the garage to the interior of the house. CX 1, p. 6. Photographs on the day of the inspection show the open doors, with paint debris from the renovation project apparent at the location of the door openings. CX 15-16.

Paragraph 37: Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), by amending 40 C.F.R. Part 745, Subparts E and L (the "Renovation, Repair and Painting Rule" or the "RRP Rule"). Respondent's failure on the day of the inspection when renovation activities were ongoing to close doors and windows within 20 feet of the renovation violates the regulatory requirements of 40 C.F.R. § 745.85(a)(2)(ii)(A). Respondent, therefore, violated Section 409 of TSCA, 15 U.S.C. § 2689.

Count Three

Paragraph 38: Each and every Narrative Statement explaining factual/legal bases for allegations denied or otherwise not admitted the Answer is incorporated by reference herein.

Paragraph 39: The regulation at 40 C.F.R. § 745.85(a)(2)(ii)(B) speaks for itself.

Paragraph 40: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 28. Respondent's maintenance crew leader stated on the day of the inspection that on that day he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The inspector on the day of the inspection observed no impermeable material or plastic sheeting anywhere on the project. CX 1, p. 6. The Respondent's maintenance crew leader on

the day of the inspection stated that the plastic sheeting had been removed the day prior to the inspection. CX-1, p.6. The inspector observed on the day of the inspection an overhead garage door at the north rear of the residence that was raised, as well as an open door leading from the garage to the interior of the house. CX 1, p. 6. Photographs on the day of the inspection show the open doors, with paint debris from the renovation project apparent at the location of the door openings, and with no impermeable material or plastic sheeting. CX 15-16.

Paragraph 41: Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), by amending 40 C.F.R. Part 745, Subparts E and L (the "Renovation, Repair and Painting Rule" or the "RRP Rule"). Respondent's failure on the day of the inspection when renovation activities were ongoing to ensure that doors within the work area that were used while the job was being performed were covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area violates the regulatory requirements of 40 C.F.R. § 745.85(a)(2)(ii)(B). Respondent, therefore, violated Section 409 of TSCA, 15 U.S.C. § 2689.

Count Four

Paragraph 42: Each and every Narrative Statement explaining factual/legal bases for allegations denied or otherwise not admitted the Answer is incorporated by reference herein.

Paragraph 43: The regulation at 40 C.F.R. § 745.85(a)(2)(ii)(C) speaks for itself.

Paragraph 44: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 28. Respondent's maintenance crew leader stated on the day of the inspection that on that day he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The inspector on the day of the inspection observed no impermeable material or plastic sheeting anywhere on the project. CX 1, p. 6. The Respondent's maintenance crew leader on the day of the inspection stated that the plastic sheeting had been removed the day prior to the inspection. CX-1, p.6. Photographs on the day of the inspection show no impermeable material or plastic sheeting at the work site. CX 6-7, CX 9-34, CX 36, CX 38-40.

Paragraph 45: Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), by amending 40 C.F.R. Part 745,

Subparts E and L (the "Renovation, Repair and Painting Rule" or the "RRP Rule"). Respondent's failure on the day of the inspection when renovation activities were ongoing 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, on a day renovation was ongoing, violates the regulatory requirements of 40 C.F.R. § 745.85(a)(2)(ii)(C). Respondent, therefore, violated Section 409 of TSCA, 15 U.S.C. § 2689.

Count Five

Paragraph 46: Each and every Narrative Statement explaining factual/legal bases for allegations denied or otherwise not admitted the Answer is incorporated by reference herein.

Paragraph 47: The regulation at C.F.R. § 745.85(a)(4)(i) speaks for itself.

Paragraph 48: The EPA inspector on the day of the inspection observed two workers scraping paint at the base of the west side of the house and at a window at the southwest corner on the west side of the house. CX 1, p. 6. Photographs on the day of the inspection show workers scraping paint. CX 8, CX 28. Respondent's maintenance crew leader stated on the day of the inspection that on that day he noticed old paint was peeling off so he had his workers scrape the peeling paint. CX 1, p. 6. Scraping paint is a renovation activity. 40 C.F.R. § 754.83. Respondent was thus engaged in renovation activities on the day of the inspection.

The EPA inspector on the day of the inspection observed paint chips and debris at the base of the house, and throughout the yard and on the public sidewalks and verge. CX 1, p.6. The EPA inspector on the day of the inspection observed an open plastic bag of paint chips and debris at the work site. CX 1, p. 6. Photographs on the day of the inspection show paint chips and debris as observed by the inspector. CX 6-7, CX 9-34, CX 36, CX 38-40.

Paragraph 49: Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). In 2008, EPA promulgated regulations to implement Section 402(c)(3) of TSCA, 15 U.S.C. § 2682(c)(3), by amending 40 C.F.R. Part 745, Subparts E and L (the "Renovation, Repair and Painting Rule" or the "RRP Rule"). Respondent's failure on the day of the inspection when renovation activities were ongoing to contain waste from renovation activities to prevent the release of dust and debris before the waste was removed from the work area for storage or disposal, on a day renovation was ongoing, violates the regulatory requirements of 40 C.F.R. § 745.85(a)(4)(i). Respondent, therefore, violated Section 409 of TSCA, 15 U.S.C. § 2689.

Relief

Paragraph 50: Section 16(a) of TSCA, 15 U.S.C. 2615(a), provides for the assessment of civil penalties by the Administrator of EPA for a violation of Section 409 of TSCA, 15 U.S.C. § 2689. Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). Absent any specific issue raised in the Answer, Complainant believes that the Complaint conforms to the requirements of the Consolidated Rules. 40 C.F.R. § 22.14(a).

Paragraph 51: The statutes speak for themselves.

Paragraph 52: Section 16(a) of TSCA, 15 U.S.C. 2615(a), provides for the assessment of civil penalties by the Administrator of EPA for a violation of Section 409 of TSCA, 15 U.S.C. § 2689. Section 409 of TSCA, 15 U.S.C. § 2689, provides that it is unlawful for any person to fail to comply with any rule issued under subchapter IV, Lead Exposure Reduction (Sections 401-412 of TSCA, 15 U.S.C. § 2681-2692). Absent any specific issue raised in the Answer, Complainant believes that the Complaint conforms to the requirements of the Consolidated Rules. 40 C.F.R. § 22.14(a).

Paragraph 53: The proposed penalty of \$26,840 is in accordance with EPA's August 2010 Interim Final Policy entitled, "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (ERPP). Complainant's witness Ms. Candace Bednar will testify to the calculation of the penalty. She prepared the Civil Penalty Assessment Worksheet for LLP, LLC. CX 42. Further facts and documentation on penalty assessment are provided in this Initial Prehearing Exchange section 2.(B), (C), and (D).

Paragraph 54: No issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty were stated in the Answer, as "circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. § 22.15(b). Absent any specific issue raised in the Answer, or since the Answer, Respondent has not established bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.

2.(B) FACTUAL INFORMATION AND DOCUMENTATION RELEVANT TO ASSESSEMENT OF PENALTY; AND INTERNET ADDRESS OF PENALTY POLICY

Section 16(a)(2)(B) of TSCA, 15 U.S.C. 2615(a)(2)(B), provides that in determining the amount of a civil penalty, the EPA shall take into account the nature, circumstances, extent and gravity of the violations, and with respect to the violator: a) its ability to pay, b) the effect on its ability to continue to do business, c) any history of prior violations, d) the degree of culpability, and e) such other matters as justice may require. Also considered in assessing a proposed penalty is EPA's August 2010 Interim Final Policy entitled, "Consolidated Enforcement Response and

Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule” (ERPP). The ERPP provides a rational, consistent, and equitable calculation methodology for applying the statutory penalty factors enumerated above to particular cases. The internet address of the ERPP is:
<http://www.epa.gov/compliance/resources/policies/civil/penalty/leadbasedpaint-consolidatederpp0810.pdf>

With respect to the violations:

- (1) The *nature* of a violation is its essential character of the violation. RRP violations are characterized as “chemical control”. The Inspection Report and Attachments, CX 1, documents the factual information supporting that the violations are all RRP violations.
- (2) The *circumstance* of the violation represents the probability of harm resulting from a particular type of violation. The ERPP uses a table, Appendix A, which determines the circumstance level for RRP violations based on the specific violations and corresponding C.F.R. citations. The Inspection Report and Attachments document the factual information supporting the several RRP violations. CX 1. The Civil Penalty Assessment Worksheet references the specific C.F.R. sections for the violations, which correspond to the circumstance levels in Appendix A. CX 42.
- (3) The *extent* of the violation represents the degree, range, or scope of a violation’s potential for harm. The ERPP characterizes extent by consideration of age of children occupying the housing, pregnant women living in housing, and whether there is a child-occupied facility. The Inspection Report and Attachments document that the housing was vacant during the renovation. CX 1, p. 6.
- (4) The *gravity* of the violation incorporates the nature and circumstance of a violation and extent to which the violation poses a potential for harm. The ERPP uses the “Gravity-Based Penalty Matrices,” Appendix B, to incorporate the nature, circumstance, and extent factors to derive an appropriate gravity-based penalty. The factual information described in items (1), (2), and (3) above are used to identify the appropriate matrix amount for each violation. The Civil Penalty Assessment Worksheet identifies the penalties for each alleged violation. CX 42.

With respect to the violator:

- (1) *Inability to pay*. The Respondent has not alleged in its Answer or by other means any inability to pay the proposed penalty in its Answer, or provided any financial documentation to Complainant on inability to pay. The Complaint, paragraph 54, states that “The proposed penalty is based on the best information available to EPA at the time he Complaint is issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.”

- (2) *Ability to continue to do business.* The Respondent has not alleged in its Answer or by other means that it is unable to continue to do business due to the proposed penalty, or provided any financial documentation to Complainant on its ability to continue to do business. The Complaint, paragraph 54, states that “The proposed penalty is based on the best information available to EPA at the time the Complaint is issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.”
- (3) *History of prior violations.* The Respondent does not have a history of prior TSCA RRP violations.
- (4) *Culpability.* The Complaint does not reflect any increase the ERPP Appendix B penalty amounts for the violations based on culpability. The ERPP allows a 25% upward or downward adjustment. Nonetheless, factual information from the inspection shows the Respondent: (1) controlled the worksite in that it both owned the property and employed the workers performing the renovation; (2) knew the applicable regulations in that it was a certified firm pursuant to 40 C.F.R. § 745.89 and the owner of the Respondent was a certified renovator pursuant to 40 C.F.R. § 745.90; and (3) knew or should have known of the requirements violated in that it is a business enterprise that is in the business renting housing, and has firm and renovator certifications as noted above. CX 1, p.6, Attachment C p. 1-2.; CX 43-44
- (5) *Such other matters as justice may require.* Determining the economic benefit of noncompliance is authorized under the “as justice may require” factor. ERPP footnote 20. No penalty was proposed based on economic benefit of noncompliance, and Complainant offers no proof of such. Other factors in this category are: (1) voluntary disclosure of the violation prior to an inspection, investigation, or tip/complaint.; (2) attitude; and (3) special circumstances/extraordinary adjustments. ERPP p. 23-24. For item (1), there was no voluntary disclosure by Respondent of the violations prior to the inspection. For item (2), adjustments may be made where settlement is negotiated prior to a hearing. Because this matter is in litigation, this factor does not apply. For item (3), Respondent has provided no basis of special circumstances/extraordinary adjustments to Complainant to consider for penalty reduction. The Complaint, paragraph 54, states that “The proposed penalty is based on the best information available to EPA at the time the Complaint is issued. The penalty may be adjusted if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the appropriate amount of the proposed penalty.”

2.(C) DETAILED EXPLANATION OF FACTORS CONSIDERED AND METHODOLOGY USED IN CALCULATING THE PROPOSED PENALTY

Section 16(a) of TSCA, 15 U.S.C. § 2615(a), and 40 C.F.R. § 745.87(d) authorize the EPA Administrator to assess a civil penalty of up to \$25,000 for each violation of Section 409 of TSCA, 15 U.S.C. § 2689. Each day that such a violation continues constitutes a separate violation of section 15 of TSCA, 15 U.S.C. § 2614. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19, increased these

statutory maximum penalties to \$37,500 for violations that occurred after January 12, 2009.

The penalty calculation for the Complaint, took into account the statutory factors, the ERPP, and the factual information and supporting documentation discussed in section 2.B above, *with the exception of the factors for a downward adjustment for the culpability of the violator.*

In this matter, EPA's compliance officer, Ms. Candace Bednar, made the penalty determinations for the Complaint, after consultation with the members of the EPA Region 7 Lead Team. A detailed explanation of Ms. Bednar's penalty calculations is given below:

Count One: The Respondent violated 40 C.F.R. § 745.85(a)(1) by failing to post signs or maintain the signs in place clearly defining the work area and warning occupants and other persons not involved in the renovation activities to remain outside of the work area. From the table of violations in Appendix A to the ERPP, Ms. Bednar determined that the circumstance level for the cited violation is Level 1b. ERPP Appendix A, p. A-1. In accordance with the Extent Category Matrix, Ms. Bednar determined that the violation fell in the minor extent category since the house was vacant and there were no children or pregnant women at the target housing, and the house was not a child-occupied facility. CX 1, p. 6. The resultant penalty for the violation occurring on November 9, 2015, is \$2,240. ERPP Appendix B, p. B-2. Once the gravity-based penalty was determined, Ms. Bednar made no upward or downward adjustments. The penalty matrix information for the count is summarized in the Civil Penalty Assessment Worksheet. CX 42. The worksheet was provided with the Complaint.

Count Two: The Respondent violated 40 C.F.R. § 745.85(a)(2)(ii)(A) by failing to close doors and windows within 20 feet of the renovation. From the table of violations in Appendix A to the ERPP, Ms. Bednar determined that the circumstance level for the cited violation is Level 2a. ERPP Appendix A, p. A-5. In accordance with the Extent Category Matrix, Ms. Bednar determined that the violation fell in the minor extent category since the house was vacant and there were no children or pregnant women at the target housing, and the house was not a child-occupied facility. CX 1, p. 6. The resultant penalty for the violation occurring on November 9, 2015, is \$6,000. ERPP Appendix B, p. B-2. Once the gravity-based penalty was determined, Ms. Bednar made no upward or downward adjustments. The penalty matrix information for the count is summarized in the Civil Penalty Assessment Worksheet. CX 42. The worksheet was provided with the Complaint.

Count Three: The Respondent violated 40 C.F.R. § 745.85(a)(2)(ii)(B) by failing to ensure that doors within the work area that were used while the job was being performed were covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area. From the table of violations in Appendix A to the ERPP, Ms. Bednar determined that the circumstance level for the cited violation is Level 2a. ERPP Appendix A, p. A-5. In accordance with the Extent Category Matrix, Ms. Bednar determined that the violation fell in the minor extent category since the house was vacant and there were no children or pregnant women at the target housing, and the house was not a child-occupied facility. CX 1, p. 6. The resultant penalty for the violation

occurring on November 9, 2015, is \$6,000. ERPP Appendix B, p. B-2. Once the gravity-based penalty was determined, Ms. Bednar made no upward or downward adjustments. The penalty matrix information for the count is summarized in the Civil Penalty Assessment Worksheet. CX 42. The worksheet was provided with the Complaint.

Count Four: The Respondent violated 40 C.F.R. § 745.85(a)(2)(ii)(C) by failing 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. From the table of violations in Appendix A to the ERPP, Ms. Bednar determined that the circumstance level for the cited violation is Level 2a. ERPP Appendix A, p. A-5. In accordance with the Extent Category Matrix, Ms. Bednar determined that the violation fell in the minor extent category since the house was vacant and there were no children or pregnant women at the target housing, and the house was not a child-occupied facility. CX 1, p. 6. The resultant penalty for the violation occurring on November 9, 2015, is \$6,000. ERPP Appendix B, p. B-2. Once the gravity-based penalty was determined, Ms. Bednar made no upward or downward adjustments. The penalty matrix information for the count is summarized in the Civil Penalty Assessment Worksheet. CX 42. The worksheet was provided with the Compliant.

Count Five: The Respondent violated 40 C.F.R. § 745.85(a)(4)(i) by failing to contain waste from renovation activities to prevent the release of dust and debris before the waste was removed from the work area for storage or disposal. From the table of violations in Appendix A to the ERPP, Ms. Bednar determined that the circumstance level for the cited violation is Level 2a. ERPP Appendix A, p. A-5. In accordance with the Extent Category Matrix, Ms. Bednar determined that the violation fell in the minor extent category since the house was vacant and there were no children or pregnant women at the target housing, and the house was not a child-occupied facility. CX 1, p. 6. The resultant penalty for the violation occurring on November 9, 2015, is \$6,000. ERPP Appendix B, p. B-2. Once the gravity-based penalty was determined, Ms. Bednar made no upward or downward adjustments. The penalty matrix information for the count is summarized in the Civil Penalty Assessment Worksheet. CX 42. The worksheet was provided with the Compliant.

The sum of the penalties for Counts One through Five is \$26,840.

**2.(D) COPY OR INTERNET ADDRESS OF EPA GUIDANCE, POLICIES, OR
PREAMBLES RELIED UPON**

1. EPA's August 2010 Interim Final Policy entitled, "Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule" (ERPP).

<http://www.epa.gov/compliance/resources/policies/civil/penalty/leadbasedpaint-consolidatederpp0810.pdf>

2. Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692, 21707 (Mar. 31, 2008) (Preamble to Final Rule).

<http://www.gpo.gov/fdsys/pkg/FR-2008-04-22/pdf/E8-8141.pdf>

RESERVATION OF RIGHTS

Complainant respectfully reserved the right to call all witnesses called by the Respondent; to recall any of its witnesses in rebuttal; and to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Presiding Officer.

Respectfully submitted,



Robert W. Richards, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219

(Complainant Exhibits)
(Certificate of Service)