

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 1 – NEW ENGLAND**

In the Matter of:	)	
	)	Docket No.
BUILD-IT BROS., LLC	)	TSCA-01-2019-0055
38 Mussey Road	)	
Scarborough, ME 04074	)	
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**EPA RESPONSE TO ORDER TO SHOW CAUSE**

On September 24, 2020, the Regional Judicial Officer for EPA Region 1 issued an Order to Show Cause requiring EPA to show good cause as to why a \$4,080 base penalty should be assessed against Respondent for the violation of 40 C.F.R. §§ 745.84(a)(1) and 745.84(a)(2) alleged in the Second Count of the Complaint relative to the failure to provide lead hazard information (i.e., an EPA-approved pamphlet) prior to renovation. Through this response, Complainant seeks to establish the basis, and show good cause, for the assessment of the \$4,080 base penalty for the Second Count (“Count 2”).

As part of Complainant’s July 14, 2020 Motion for Default Order (“Motion”) seeking assessment of a penalty against Respondent, Build-It Bros., LLC, for failure to file an Answer in the above-captioned case, EPA filed a Memorandum in Support of Motion for Default Order (“Memorandum”) and several supporting Exhibits, numbered 1, 2, 3, 4, 5, 6 and 7, as well as a Proposed Default Order. For convenience, Exhibit 5 (Penalty Summary) is attached.

Complainant’s Motion and Memorandum request, among other things, that an inflation-adjusted, base penalty of \$4,080 be used in calculating a penalty against Respondent for Count 2. To arrive at this amount, Complainant relies on EPA’s applicable penalty policy and penalty inflation guidance, including the August 2010 Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-

Based Paint Activities Rule (“RRP Penalty Policy”) <sup>1</sup> as well as applicable inflation guidance in effect at the time the Complaint was filed in September 2019, namely, EPA’s January 11, 2018 memorandum entitled Amendments to the EPA’s Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule<sup>2</sup> (“2018 Inflation Guidance”).

The RRP Penalty Policy provides guidance on calculating penalties for violations of the Renovation, Repair, and Painting Rule<sup>3</sup> (“RRP Rule”), the Pre-Renovation Education Rule<sup>4</sup> (“PRE Rule”), and the Lead-Based Paint Activities, Certification, and Training Rule<sup>5</sup> (“LBP Activities Rule”), each promulgated under Title IV of Toxic Substance Control Act (“TSCA”), 15 U.S.C. §§ 2681-2692. In the RRP Penalty Policy’s penalty matrices in Appendix A beginning on page B-1, two tiers of penalties are specified, an “a” level and a “b” level. These levels are further explained in footnote 48 of the RRP Penalty Policy which states “Circumstance Level “b” is for PRE Rule requirements which are “hazard assessment” in Nature [and]

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<sup>1</sup> Available at <https://www.epa.gov/enforcement/revised-interim-final-consolidated-enforcement-response-and-penalty-policy-pre>.

<sup>2</sup> Available at <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications#penalty>.

<sup>3</sup> Reference is made to 40 C.F.R. Part 745, Subparts E, L and Q (73 Fed. Reg. 21692 (April 22, 2008), amending the PRE Rule, LBP Activities Rule, and State/Tribal Programs Rule, respectively, at 40 C.F.R. §§ 745.80-745.91, 745.220, 745.225, 745.320, 745.324, 745.326, 745.327, and 745.339.

<sup>4</sup> Reference is made to 40 C.F.R. Part 745, Subpart E (40 C.F.R. §§ 745.80-745.88); 63 Fed. Reg. 29907 (June 1, 1998).

<sup>5</sup> Reference is made to 40 C.F.R. Part 745, Subpart L (40 C.F.R. §§ 745.220-745.239); 61 Fed. Reg. 45778 (August 29, 1996), as amended 64 Fed. Reg. 42849 (August. 6, 1999).

Circumstance Level “a” is for LBP Activities Rule and RRP Rule requirements which are “chemical control” in Nature...” See RRP Penalty Policy, page A-1, footnote 48.

Since the lead hazard disclosure violation alleged in Count 2 is a “hazard assessment” violation in nature, unlike the other violations alleged in the Complaint, its penalty draws from the “b” level part of the matrix. These “b” level amounts in the RRP Penalty Policy are based on the amounts developed for other, like violations of lead-based paint requirements, namely, the failure to provide a lead hazard pamphlet to potential renters of property, under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (“RLBPHR Act”), 42 U.S.C. § 4851 *et seq.*, and regulations promulgated thereunder, at 40 C.F.R. Part 745, Subpart F, known as the “Disclosure Rule.” See 40 C.F.R. §§ 745.100-745.119 (Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property). The assessment of penalties for Disclosure Rule violations is governed by EPA’s December 2007 Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy (“1018 Penalty Policy”)<sup>6</sup> and, in fact, the level “b” amounts in the RRP Penalty Policy are drawn from this 1018 Penalty Policy, including the lower statutory maximum specified by the RLBPHR Act. Further, in an effort to be fully consistent in assessing penalties for lead disclosure (hazard assessment) violations in both PRE Rule and Disclosure Rule cases (namely, providing a pamphlet), EPA also applies the same inflation multiplier to the level “b” amounts in the RRP Penalty Policy that is applied to amounts specified for such violations under the 1018 Penalty Policy. Under the

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<sup>6</sup> Available at <https://www.epa.gov/enforcement/section-1018-disclosure-rule-enforcement-response-and-penalty-policy-erpp-december-2007>.

2018 Inflation Policy, at the time the Complaint was filed, this inflation multiplier was 1.58136.<sup>7</sup> For Count 2, this means that the \$2,580 base amount drawn from the applicable matrix in the RRP Penalty Policy<sup>8</sup> was adjusted for inflation using the 1.58136 multiplier applicable to that kind of violation rather than the 1.03711 multiplier used for the other RRP Rule violations alleged in the Complaint.

In light of the above, Complainant notes that the \$4,080 amount referenced in Complainant's Memorandum and Penalty Summary (Exhibit 5) is appropriate and proper. Specifically, this amount is the result of applying the applicable inflation multiplier of 1.58136 to the appropriate Level "1b" matrix amount of \$2,580 (the amount in effect in December 2007 when EPA issued the narrative 1018 Penalty Policy) and rounding up, as follows:  $\$2,580 \times 1.58136 = \$4,079.9088$ . While the undersigned regrets any confusion caused by my reference, in footnote 3 of Exhibit 5 to the Memorandum, to only one multiplication factor (1.03711, applicable to *most* RRP violations) when the greater multiplication factor (1.58136, applicable to "hazard assessment" violations) used for the Count 2 penalty was not referenced, this omission amounts to harmless error and has not prejudiced Respondent in any way nor presented any fair notice issue. Indeed, Complainant has always used the inflation-adjusted amount of \$4,080 as its base penalty for Count 2 and has consistently, without exception, communicated that same amount to Respondent since the time the Complaint was filed in this case.

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<sup>7</sup> See 2018 Inflation Guidance, page 14.

<sup>8</sup> See RRP Penalty Policy amount specified for Level 1b, minor extent violations (page B-1). This amount is drawn from the first matrix on page 30 of the 1018 Penalty Policy for Level 1, minor extent violations (page 30).

For the foregoing reasons, Complainant hereby requests that the Regional Judicial Officer for EPA Region 1 grant EPA's Motion for Default Order, as further explained in the Memorandum and other supporting documents, and issue a Default Order to Respondent assessing a total civil administrative penalty of \$1,456 against Build-It Bros., LLC for the violations alleged in the Complaint.

Respectfully Submitted,

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*electronically signed and dated*

Hugh W. Martinez  
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that, on the date indicated, the foregoing Cover Letter to the Regional Hearing Clerk and EPA Response to Order to Show Cause (with attached Penalty Summary) were sent, in PDF format, via e-mail to the Regional Hearing Clerk at [R1\\_Hearing\\_Clerk\\_Filings@epa.gov](mailto:R1_Hearing_Clerk_Filings@epa.gov) and to Respondent's representative, as follows:

One copy, in PDF format, via e-mail to [dimagee@dr.com](mailto:dimagee@dr.com) with a hard copy to follow by mail, directed to:

David Magee, Owner and Registered Agent  
Build-It Bros., LLC  
38 Mussey Road  
Scarborough, ME 04074

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*electronically signed and dated*

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