

**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)	
_____)	

EPA RESPONSE TO SUPPLEMENTAL ORDER TO SHOW CAUSE

On September 24, 2020, the Regional Judicial Officer for EPA Region 1 (“RJO”) issued an Order to Show Cause (“Order”) 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 (“Count 2”) relative to the failure to provide lead hazard information (i.e., an EPA-approved pamphlet) prior to renovation. In response, the undersigned provided a detailed, substantive EPA Response to Order to Show Cause, on October 7, 2020 (“EPA Response”). For convenience, that EPA Response is attached.

On October 14, 2020, the RJO sought further clarification from EPA and issued a Supplemental Order to Show Cause (“Supplemental Order”) requiring EPA to show good cause as to why, under EPA’s 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”) (revised April 2013), the \$2,580 base penalty amount found in the Matrix for Level 1b, Minor violations that occurred on or before January 12, 2009 should be used to calculate the penalty for the violation alleged in Count 2 of the Complaint rather than the base penalty amount found in the Matrix that applies to Level 1b, Minor violations that occurred after January 12, 2009. Through this EPA Response to Supplemental Order to Show Cause (“Supplemental Response”), Complainant seeks to establish

the basis, and show good cause, for using that \$2,580 base penalty amount for the Level 1b, Minor violation set for the in Count 2.

As explained in the EPA Response, as well as in Complainant’s July 14, 2020 Motion for Default Order (“Motion”) and accompanying Memorandum in Support of Motion for Default Order (“Memorandum”), to calculate the penalties sought in this case, EPA relies on applicable Agency penalty policy and penalty inflation guidance, including the RRP Penalty Policy and the January 11, 2018 inflation guidance in effect at the time the Complaint was filed, 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 (“2018 Inflation Guidance”). In “Table A” of the 2018 Inflation Guidance, EPA includes a list of Agency penalty policies and their associated inflation multipliers. The penalty policies listed are described as “the most recent narrative versions of each policy.” Id. at 3. The 2018 Inflation Guidance explains how EPA, consistent with the methodology first established by EPA in July 2016¹ pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvement Act (“2015 Inflation Act”), 28 U.S.C. § 2461 note, Pub. L. 114-74,² amends the narrative penalty policies

¹ See Amendments to the U.S. Environmental Protection Agency’s Civil Penalty Policies to Account for Inflation (Effective August 1, 2016), available at <https://www.epa.gov/sites/production/files/2017-01/documents/finalpenaltyinflationguidance.pdf> (“2016 Inflation Guidance”). The 2018 Inflation Guidance states that, “[t]his memorandum supersedes the inflation-based amendments to the EPA’s penalty policies made in the 2016 memorandum [i.e., the 2016 Inflation Guidance], but *is not intended to change the methodology used in that memorandum.*” [emphasis added]

² The 2015 Inflation Act is available at <https://www.congress.gov/114/plaws/publ74/PLAW-114publ74.pdf>.

listed in Table A through use of the inflation multipliers listed for each policy. Id.³ For calculating penalties, the 2018 Inflation Guidance further specifies that EPA enforcement personnel “should apply the multipliers in Table A only to the penalty amounts adopted within the “narrative” penalty policies listed in Table A.” Id. at 4.

As explained in the EPA Response, penalties for lead hazard disclosure violations of the kind alleged in Count 2 come from the “b” level amounts in the RRP Penalty Policy matrix which, in turn, are drawn from penalties EPA developed for like disclosure violations specified in the December 2007 Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy (“1018 Penalty Policy”). For maximum consistency, EPA applies the same inflation multiplier to the level “b” amounts in the RRP Penalty Policy that it applies to such amounts specified for the same type of such violations under the December 2007 1018 Penalty Policy.⁴ Since the level “b” penalty amounts referenced in the RRP Policy are drawn from those amounts adopted in the December 2007 1018 Penalty Policy, then the appropriate RRP Penalty Policy matrix to use for purposes of applying an inflation multiplier is the matrix for violations “on or before January 12, 2009” since that contains penalties “adopted” within the “narrative” 1018 Penalty Policy, as issued in December 2007.

Based on the above, Complainant contends that a \$4,080 base penalty should be assessed against Respondent for the violation alleged in Count 2 (failure to provide an EPA-

³ The 2018 Inflation Guidance states “[t]his memorandum does not change or alter the narrative version of the media-specific penalty policies; this memorandum only alters the numerical gravity-based penalty amounts that are calculated under those policies to account for inflation.” Id. at 3.

⁴ See 2016 Inflation Guidance, fn. 21.

approved pamphlet prior to renovation) and that this amount is properly calculated by multiplying the \$2,580 base amount drawn from the applicable matrix in the RRP Penalty Policy⁵ by the inflation multiplier of 1.58136 that applies to this type of violation. More specifically, the \$4,080 penalty amount is appropriate and proper in that it is the result of applying the applicable inflation multiplier (1.58136) to the appropriate Level “1b” matrix amount (\$2,580) adopted in December 2007 when EPA issued the 1018 Penalty Policy and rounding up, as follows: $\$2,580 \times 1.58136 = \$4,080$.

For the foregoing reasons, Complainant hereby requests that the Regional Judicial Officer for EPA Region 1 grant EPA’s Motion for Default Order filed in this case, as explained in the Memorandum and other supporting documents filed therewith, 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,

electronically signed and dated

Hugh W. Martinez, Counsel for Complainant

⁵ Reference is made to the RRP Penalty Policy amount specified on page B-1 for Level 1b, minor extent violations “on or before January 12, 2009.” This amount is drawn from the first matrix located on page 30 of the 1018 Penalty Policy for Level 1, minor extent violations “on or after March 15, 2004.”

CERTIFICATE OF SERVICE

I hereby certify that, on the date indicated, the foregoing Cover Letter to the Regional Hearing Clerk and EPA Response to Supplemental Order to Show Cause (with attachment) were sent, in PDF format, via e-mail to the Regional Hearing Clerk at 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 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

electronically signed and dated

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