UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of:	)	
BUILD-IT BROS., LLC	)	
38 Mussey Road	)	**Docket No.**
Scarborough, Maine 04074,	)	**TSCA-01-2019-0055**
Respondent.	)	
Proceeding under Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. § 2615(a).	)	

MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT ORDER

The Complainant, the United States Environmental Protection Agency ("EPA"), has moved for the issuance of an order finding that Respondent, Build-It Bros., LLC ("Respondent" or "Built-It Bros."), is in default in this matter, and finding that Respondent violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, and the federal regulations promulgated thereunder, set forth at 40 C.F.R. Part 745, Subpart E (the "Renovation, Repair and Painting Rule" or "RRP Rule"), and assessing a penalty of one thousand four hundred and fifty-six dollars ($1,456).

I. Respondent Should Be Found in Default

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Part 22 Rules"), provide that a party may be found to be in default after motion, upon failure to file a timely answer to the complaint. 40 C.F.R. § 22.17.

EPA filed the Complaint in this action on September 30, 2019. In the Complaint, EPA alleged in four counts that Respondent violated federally enforceable provisions of TSCA

Section 409 and the RRP Rule, and that Respondent is therefore subject to penalties under TSCA Section 16, 15 U.S.C. § 2615. A copy of the Complaint is attached as Exhibit 1.

EPA mailed Respondent a copy of the Complaint and the Part 22 Rules by certified mail, return receipt requested, at the time of filing. *See* 40 C.F.R. §§ 22.5(b)(1) and 22.5(b)(1)(ii)(A). After EPA received the unopened Complaint package that was returned by the U.S. Postal Service as "unclaimed," EPA resent the Complaint package to Respondent and, thereafter, received the return receipt indicating signature for the Complaint by Respondent on November 8, 2019. EPA filed a copy of this proof of service with the Regional Hearing Clerk, on November 14, 2019. *See* Exhibits 2a and 2b (Cover Letter to the Regional Hearing Clerk and "Green Card"). Accordingly, service of the Complaint was complete on November 8, 2019 under the Part 22 Rules, at 40 C.F.R. § 22.7(c).

On December 5, 2019, after a period of actively discussing the possibility of settlement, Complainant and Respondent filed a Joint Motion for Extension of Time to Answer ("Joint Motion"). *See* Exhibit 3 (Joint Motion). The Joint Motion was intended to allow for more time to review substantive information and documents (including relevant financial information) and, as appropriate, prepare settlement terms. On December 9, 2019, the Regional Judicial Officer issued an Order granting the parties' Joint Motion and extending the deadline for Respondent to file an Answer to January 23, 2020. *See* Exhibit 4 (Order). No other motions have been filed in this case.

From November 8, 2019 into December 2019, and into January and February 2020, the undersigned Complainant's counsel had some limited success communicating with Respondent via telephone and e-mail. Efforts were made during that time period to address any unanswered questions concerning compliance, and to reach a settlement in principle between Complainant

and Respondent on payment of a mutually agreeable civil penalty amount. By April 2020, the parties appeared to have reached agreement on all the specific terms of a Consent Agreement and Final Order ("CAFO"), and Counsel for Complainant sent Respondent a proposed CAFO. Nonetheless, throughout this time period, communication with Respondent continued to be intermittent. Despite EPA counsel's attempts to contact Respondent, either by telephone or e-mail, on more than 15 occasions between January 30, 2020 and May 5, 2020, Complainant never received any substantive response, signature, or other formal acceptance of settlement from Respondent.

Respondent has not filed an Answer to the Complaint, and the extended deadline for filing an Answer has lapsed. *See* 40 C.F.R. § 22.15(a). Because Respondent has not filed a timely Answer to the Complaint, Respondent should be found in default. Such default constitutes an admission of all facts alleged in the Complaint and a waiver of any rights to contest the factual allegations of the Complaint. *See* 40 C.F.R. § 22.17(a).

II. Respondent's Actions Violated TSCA

The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the Complaint establishes a *prima facie* case that Respondent violated TSCA Section 409 and the RRP Rule.

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act ("Act") in response to findings that low-level lead poisoning is widespread among American children, that pre-1980 American housing stock contains more than three million tons of lead in the form of lead-based paint, and that the ingestion of lead from deteriorated or abraded lead-based paint is the most common cause of lead poisoning in children. One of the stated purposes of the Act is to ensure that the existence of lead-based paint hazards is taken into account during

the renovation of homes and apartments. To carry out this purpose, the Act added a new title to TSCA entitled "Title IV-Lead Exposure Reduction," which currently includes Sections 401-411 of TSCA, 15 U.S.C. §§ 2681-2692.

In 1996, EPA promulgated regulations to implement Section 402(a) of TSCA, 15 U.S.C. § 2682(a). These regulations are set forth at 40 C.F.R. Part 745, Subpart L. In 1998, EPA promulgated regulations to implement Section 406(b) of the Act. These regulations are set forth at 40 C.F.R. Part 745, Subpart E. 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 "RRP Rule" and the "Lead-Based Paint Activities Rule," respectively).

Pursuant to 40 C.F.R. § 745.82, the regulations in 40 C.F.R. Part 745, Subpart E, apply to all renovations performed for compensation in "target housing." As provided in 40 C.F.R. § 745.83, "renovation" means the "modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement." "Renovation" includes removal, modification or repair of painted surfaces or painted components (e.g., modification of painted doors, surface restoration, window repair, surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust)). Pursuant to Section 401(17) of TSCA, as amended, 15 U.S.C. § 2681(17), the housing stock addressed by the Act and the RRP Rule is "target housing," defined as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless any child who is less than 6 years of age resides or is expected to reside in such housing). *See* 40 C.F.R. § 745.103.

The RRP Rule sets forth procedures and requirements for, among other things, the accreditation of training programs, the certification of renovation firms and individual

renovators, the work practice standards for renovation, repair and painting activities in target housing and child-occupied facilities, and the establishment and maintenance of records. The RRP Rule also requires that renovation firms and renovators provide the EPA-approved pamphlet, *Renovate Right*, to a lessee or adult occupant before renovation activities begin and obtain written verification that the pamphlet was provided. *See* 40 C.F.R. §§ 745.81(a)(2), 745.84(a)(2), 745.89(d)(1)-(2), and 745.86(a) and (b).

Respondent is a Maine limited liability company with its principal business offices located at 38 Mussey Road in Scarborough, Maine, and is a "firm" as defined at 40 C.F.R. § 746.83. (Complaint, paragraphs 19 and 28.) Operated under the direction of its owner and manager, David Magee, Respondent provides residential renovation services in and around the Portland, Maine area. (Complaint, paragraph 20.) In January and February 2019, Respondent performed renovations, including the removal of old exterior porch components, repairs, installation of new porches and components, and painting and painting-related activities, at a multi-unit residential property located at 613 Washington Avenue in Portland, Maine ("Subject Property"). (Complaint, paragraphs 21 and 22.) At all times relevant to the allegations in the Complaint, the Subject Property, constructed in or around the 1920s, was "target housing," as defined in Section 401(17) of TSCA and 40 C.F.R. § 745.103. (Complaint, paragraphs 23 and 27.) At all times relevant to the allegations in the Complaint, Respondent's exterior work at the Subject Property constituted a "renovation" within the meaning of 40 C.F.R. § 745.83, and a renovation for compensation within the meaning of TSCA Section 406(b) and 40 C.F.R. § 745.103. (Complaint, paragraphs 21 and 26.)

The work done by Respondent in January and February 2019 at the Subject Property (hereinafter, the "Subject Renovation") came to the attention of EPA through a complaint of

improper work practices by Respondent during the Subject Renovation which involved the disturbance of over 20 square feet of exterior painted surface, including the demolition of painted surface areas, sanding and/or scraping that can generate paint chips, debris, and dust. (Complaint, paragraph 32.) On February 5, 2019, an authorized EPA inspector conducted a records inspection of Respondent with Mr. David Magee, its principal, at the offices of the Maine Department of Environmental Protection, 312 Canco Road in Portland, Maine. (Complaint, paragraph 24). Later that same day, the EPA inspector conducted a compliance inspection at the Subject Property and observed the exterior conditions of the Subject Renovation. (Complaint, paragraph 24). During the February 5, 2019 inspections and subsequent EPA investigation, EPA sought records and other information relative to Respondent's compliance with RRP Rule requirements during the Subject Renovation. (Complaint, paragraphs 25 and 29).

At all times relevant to the allegations of violation in the Complaint, Respondent was not certified as a firm under the RRP Rule. (Complaint, paragraph 34.) In addition, at all times relevant to the allegations of violation in the Complaint, no person performing renovation activities at the Subject Property on behalf of Build-It Bros. was either a certified renovator or trained by a certified renovator as required by 40 C.F.R. § 745.90. (Complaint, paragraph 44.) Finally, at no time before or during the Subject Renovation did Respondent assign a certified renovator to the work as required by 40 C.F.R. §§ 745.89(d)(1) and (d)(2). (Complaint, paragraph 44.)

As a result of the inspections and EPA's investigation of facts and circumstances underlying the violations, EPA established that Respondent did not provide the EPA-approved *Renovate Right* pamphlet to the owner or any adult occupants before commencing the renovation

of the Subject Property, as required by 40 C.F.R. §§ 745.84(a)(1)(i) or (ii) and 745.84(a)(2)(i) or (ii). (Complaint, paragraph 39.)

As a result of the inspections and EPA's investigation, EPA established that Respondent did not ensure that the ground was covered with impermeable material sufficient to collect falling paint debris from the Subject Renovation, as 40 C.F.R. § 745.85(a)(2)(ii)(C) requires. (Complaint, paragraph 49.)

Based on the above-described inspections and EPA's investigation, Complainant has identified the following violations of TSCA and the RRP Rule:

A. Failure to Obtain Firm Certification (FIRST COUNT)

Pursuant to 40 C.F.R. § 745.81(a)(2), no firm may perform, offer, or claim to perform renovations in target housing or child-occupied facilities without certification from EPA under 40 C.F.R. § 745.89, unless the renovation is exempt under 40 C.F.R. § 745.82. Under 40 C.F.R. § 745.89(a), firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling. Starting in January 2019 and continuing into February 2019, Respondent conducted renovation activities at the Subject Property which involved the disturbance of over 20 square feet of exterior painted surface, including the demolition of painted surface areas, sanding and/or scraping that can produce paint chips, debris, and dust. Such work at the Subject Property was not exempt under 40 C.F.R. § 745.82 and did not qualify as minor maintenance and repair activities under 40 C.F.R. § 745.83. At the time of the renovation work at the Subject Property in January and February 2019, Build-It Bros. had not obtained EPA-certification as a firm under 40 C.F.R. § 745.89(a). Accordingly, Respondent's performance of that work without a firm certification was a violation of 40 C.F.R. §§ 745.81(a)(2) and 745.89(a),

and TSCA Section 409 for which penalties may be assessed pursuant to Section 16 of TSCA, 15 U.S.C. § 2615. (Complaint, paragraphs 30 – 36.)

B. Failure to Provide Lead Hazard Information Pamphlet (SECOND COUNT)

Pursuant to 40 C.F.R. § 745.84(a)(1) and (a)(2), for rented residential dwelling units in target housing, firms must provide the EPA-approved lead-hazard information pamphlet to the owner and a tenant or adult occupant not more than 60 days before performing renovation activities, and also obtain a written acknowledgement of pamphlet receipt or certificate of mailing, in the manner specified at 40 C.F.R. §§ 745.84(a)(1)(i) or (ii) and 745.84(a)(2)(i) or (ii). For the renovation at the Subject Property, Respondent did not provide a lead hazard information pamphlet to the owner or any tenant or adult occupants before commencing the work and this failure to distribute a pamphlet was a violation of 40 C.F.R. § 745.84(a)(1) and (a)(2), and Section 409 of TSCA for which penalties may be assessed pursuant to Section 16 of TSCA. (Complaint, paragraphs 37 – 41.)

C. Failure to Ensure a Certified Renovator Performs or Directs Work (THIRD COUNT)

Pursuant to 40 C.F.R. § 745.89(d)(1), firms performing renovations in target housing must ensure that all individuals who perform renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator in accordance with 40 C.F.R. § 745.90. Under 40 C.F.R. § 745.89(d)(2), firms also must ensure that a certified renovator is assigned to each renovation and discharges all the certified renovator responsibilities identified in 40 C.F.R. § 745.90. At no time before or during the Subject Renovation was any person performing the renovation activities either a certified renovator or trained by a certified renovator, nor was a certified renovator assigned to the Subject Renovation, as required by 40 C.F.R. § 745.89(d)(1) and (d)(2). Respondent's failure to ensure that an individual performing

renovation activities at the Subject Renovation was either a certified renovator or trained by a certified renovator and to ensure that a certified renovator was assigned to the Subject Renovation was a violation of 40 C.F.R. § 745.89(d)(1) and (d)(2), and a prohibited act under TSCA Section 409 and 40 C.F.R. § 745.87 for which penalties may be assessed pursuant to Section 16 of TSCA. (Complaint, paragraphs 42 – 46.)

D. Failure to Properly Contain Exterior Work Area (FOURTH COUNT)

Under 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure that all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85. Forty C.F.R. § 745.85(a)(2)(ii)(C) requires, in pertinent part, that firms performing exterior renovations in target housing cover the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of the surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater. During the Subject Renovation, Respondent failed to cover the ground with plastic sheeting or other disposable impermeable material sufficient to collect falling paint debris in accordance with the RRP Rule. Such failure was a violation of 40 C.F.R. §§ 745.89(d)(3) and 745.85(a)(2)(ii)(C), and a prohibited act under TSCA Section 409 and 40 C.F.R. § 745.87 for which penalties may be assessed pursuant to Section 16 of TSCA. (Complaint, paragraphs 47 – 50.)

III. A Civil Penalty of $1,456 Should Be Assessed

Complainant recommends the imposition of a total civil penalty in the amount of $1,456 for the above-cited violations, based on the factors and considerations specified in the Complaint. (Complaint, paragraphs 52 and 53.) The following legal and factual grounds, as required by 40 C.F.R. § 22.17(b), support a finding that the proposed penalty amount is

appropriate in light of the penalty assessment criteria of TSCA Section 16, 15 U.S.C. § 2615, as applied to the circumstances of this case. A Penalty Summary is also attached, as Exhibit 5.

Section 16 of TSCA authorizes the assessment of a civil penalty of up to $37,500 for each violation of Section 409 of TSCA. This maximum penalty amount was adjusted up to $40,576 by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("Penalty Inflation Act"), Pub. L.114-74, Section 701 (Nov. 2, 2015), and EPA's Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19 ("Penalty Inflation Rule"). At the time the Complaint in this matter was issued, the maximum penalty for a violation of Section 409 of TSCA was $39,873.

Section 16 of TCSA requires Complainant to consider the nature, circumstances, extent and gravity of the violations and, with respect to Respondent, its ability to pay, the effect of the proposed penalty on the ability to continue to do business, any history of prior such violations, the degree of culpability, and other such matters as just may require. To assess a penalty for the alleged violations of the RRP Rule alleged in this Complaint, EPA has taken into account the particular facts and circumstances of this case with specific reference to the August 2010 Interim Final Policy entitled, *Consolidated Enforcement Response and Penalty Polity for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule* ("RRP Penalty Policy") (revised April 2013), as well as EPA's *Lead-Based Paint Graduated Penalty Approach Policy for Small-Scale Businesses* ("GPA Policy") (September 20, 2019). Copies of the RRP Penalty Policy and the GPA Policy are attached as Exhibit 6 and Exhibit 7, respectively. The RRP Penalty Policy and GPA Policy provide a rational, consistent,

and equitable calculation methodology for applying the above-listed statutory penalty factors to specific cases.

To document the legal and factual basis for the proposed $1,456 penalty, and to explain how that amount was calculated as the Part 22 Rules require, Complainant provides the following violation-specific explanations under both the RRP Penalty Policy and the GPA Policy. Additional detail is provided in the attached Penalty Summary. *See* Exhibit 5.

For the violation in the First Count (failure to obtain firm certification), EPA assigns a Circumstance Level of "3a" under Appendix A of the RRP Penalty Policy and a "minor" Extent of Harm level since there was no one under 18 years old known to be living in the affected units at the time of the violation. Adjusting for inflation under the Penalty Inflation Act and Penalty Inflation Rule, the penalty amount for failure to obtain an RRP firm certification before performing renovations at the Subject Property is $4,667.

For the violation in the Second Count (failure to provide a pamphlet prior to renovation), EPA assigns a Circumstance Level of "1b" under Appendix A of the RRP Penalty Policy and a "minor" Extent of Harm level for the same reason as in the First Count. Adjusting for inflation under the Penalty Inflation Act and Penalty Inflation Rule, the penalty amount for failure to provide a pamphlet prior to renovating is $4,080.

For the violation in the Third Count (failure to ensure that trained workers perform renovations and a certified renovator is assigned to each renovation), EPA assigns a Circumstance Level of "3a" under Appendix A of the RRP Penalty Policy and a "minor" Extent of Harm level for the same reason as in the First Count. Adjusting for inflation under the Penalty Inflation Act and Penalty Inflation Rule, the penalty amount for failure to ensure trained/certified workers perform and are assigned to renovations is $4,667.

For the violation in the Fourth Count (failure to contain the work area), EPA assigns a Circumstance Level of "2a" under Appendix A of the RRP Penalty Policy and a "minor" Extent of Harm level for the same reason as in the First Count. Adjusting for inflation under the Penalty Inflation Act and Penalty Inflation Rule, the penalty amount for failure to ensure trained/certified workers perform and are assigned to renovations is $6,223.

The combined total of all penalties for the First, Second, Third, and Fourth Counts is $19,637. By applying the GPA Policy in light of case-specific legal and factual issues outlined herein and in Exhibit 5 (Penalty Summary), the penalty is further recalculated to $1,456. EPA finds that assessment of a $1,456 penalty herein is reasonable and appropriate, under the facts and circumstances of this case.

IV. Conclusion

The Complainant requests that the Regional Judicial Officer issue an order finding that Respondent is in default, that Respondent violated TSCA and the RRP Rule, and that an appropriate penalty be assessed in the amount of $1,456.

Respectfully submitted,

HUGH MARTINEZ

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(Signature and Date)

Hugh W. Martinez
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