

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:)	
)	Docket No. TSCA-10-2021-0006
GREENBUILD DESIGN & CONSTRUCTION, LLC)	
)	COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE
Anchorage, Alaska)	
)	
Respondent.)	
_____)	

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

COMES NOW, the U.S. Environmental Protection Agency, Region 10 (“Complainant”), in response to this Tribunal’s February 3 and March 2, 2021 Prehearing Orders, and in response to GreenBuild Design & Construction, LLC’s (“Respondent”) Prehearing Exchange filed May 17, 2021,¹ to respectfully submit its Rebuttal Prehearing Exchange, stating as follows:

I. WITNESSES INTENDED TO BE CALLED

In its prehearing exchange, Respondent states that it intends to call Mr. Paul Maple, an employee of Respondent who was allegedly present during the July 25, 2018 inspection of 2208 Turnagain Parkway, Anchorage, Alaska (the “Turnagain Property”). Neither Ms. Farnham nor Mr. Hamlet—the EPA inspectors who inspected the Turnagain Property on July 25, 2018, CX 07—have any recollection of Mr. Maple. Rather, Ms. Farnham recalls that the conversation she had with Mr. von Marees was largely private. *See* CX 04 at 7-8.

Therefore, Ms. Farnham intends to testify that most of the conversation she had with Mr. von Marees during the July 25, 2018 inspection took place in front of the house, and that other than Mr.

¹ Complainant notes for the record that Respondent did not serve its Prehearing Exchange on Complainant, pursuant to 40 C.F.R. § 22.5(b) and this Tribunal’s February 3 and March 2, 2021 Prehearing Orders, until Thursday, May 20, 2021.

Hamlet no one else was standing nearby. *Id.* Additionally, Ms. Farnham intends to testify as to the proper operation and use of Lead Check Tests. *See* Section II, below.

Complainant also notes that Respondent's prehearing exchange did not include a brief narrative summary of each of its witness's expected testimony, as directed by this Tribunal's February 3, 2021 Prehearing Order. Complainant is therefore unable to determine what additional testimony, witnesses, or exhibits may be necessary to rebut Respondent's testimony.

II. EXHIBITS INTENDED TO BE INTRODUCED

Respondent has proffered RX 1, which it purports to be "Photos of the Lead sample test taken prior to work completed on the [Turnagain Property]. The photo shows a negative test result for lead." Respondent's Prehearing Exchange at 1. Complainant discussed the import of Respondent's alleged lead test results in its prehearing exchange. *See* Complainant's Prehearing Exchange at 19-20. *See also*, Answer, ¶4.5. RX 1 is not relevant to these proceedings as the exemption at 40 C.F.R. § 745.82(a)(2) does not apply here. Further, RX 1 is not what Respondent purports it to be, and Respondent has not complied with the documentation requirements of the RRP Rule, *see* 40 C.F.R. § 745.86, in order to establish that it actually conducted lead tests on the Turnagain Property.

A. The exception at 40 C.F.R. § 745.82(a)(2) does not apply

Complainant believes that Respondent's proffer of RX 1 is in support of an argument that the RRP Rule does not apply to Respondent's renovation of the Turnagain Property based on the exception found at 40 C.F.R. § 745.82(a)(2). The RRP Rule "applies to all renovations performed for compensation in target housing...except for the following:"

Renovations in target housing . . . in which a certified renovator, using an EPA recognized test kit as defined in §745.83 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 1.0mg/cm² or 0.5% by weight.

40 C.F.R. § 745.82(a)(2) (hereinafter the "(a)(2) exception").

By indicating that the “lead test performed was negative,” Answer, ¶4.5, Respondent is essentially arguing that the (a)(2) exception applies to its renovation of the Turnagain Property. This argument is without merit.

By its own terms, the (a)(2) exception only applies when a *certified renovator* tests the building components for the presence of lead. *Id.* (emphasis added). Respondent’s co-owner, Mr. Rodrigo von Marees, was not a certified renovator before Respondent began work on the Turnagain Property.² Answer, ¶4.5; CX 11, 12. *See* 40 C.F.R. § 745.83 (defining a certified renovator as “a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal Program.” Alaska is not an EPA-authorized State under the TSCA Lead-Based Paint program). *See also* 40 C.F.R. § 745.90 (“To become a certified renovator...an individual must successfully complete the appropriate course accredited by EPA under §745.225 or by a State or Tribal program that is authorized under Subpart Q of this part.”).

Therefore, as Mr. von Marees was not a certified renovator when Respondent asserts that he tested the Turnagain Property, the (a)(2) exception cannot apply here. 40 C.F.R. § 745.82(a)(2). Therefore, RX 1 is not relevant.

B. RX 1 is not what Respondent purports it to be

Respondent asserts that RX 1 “shows a negative test result for lead.” Respondent’s Prehearing Exchange at 1. It does not. Rather, RX 1 shows a 3M brand Lead Check Test confirmation card.

The 3M brand Lead Check Test is an EPA recognized test kit as defined in 40 C.F.R. § 745.83. *See* 40 C.F.R. § 745.82(a)(2). To properly use the 3M brand Lead Check Test on painted wood,³ a certified renovator must cut a gouge into the painted surface to be tested, through all of the layers of

² Respondent has represented to Complainant that Mr. von Marees was the individual who tested the Turnagain Property for lead.

³ The 3M brand Lead Check Test can also be used on other painted surfaces such as metal and drywall.

paint and down to the bare wood. 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 liquid inside of the swab is 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.*

If the test is negative, however, the certified renovator should then squeeze a drop of the reagent liquid from the Lead Check Test swab onto the confirmation card. This tests whether the reagent liquid is properly working. As there is a small amount of lead in the test confirmation card, if the reagent liquid is properly working, the black circle on the confirmation card will turn red. *See* <https://multimedia.3m.com/mws/media/894181O/3m-leadcheck-swabs.mp4> for an instructional video prepared by 3M describing how to properly use the 3M Lead Check Test kit.⁴

Therefore, all RX 1 confirms is that up to four 3M Lead Check Test swabs that Respondent had in its possession at some point were able to properly work. But RX 1 is not, itself, a negative test result for lead, as Respondent asserts.

The fact that Respondent represents that RX 1 is a negative test result further indicates that the (a)(2) exception cannot apply here. As further described above, the (a)(2) exception applies when a “certified renovator, using an EPA recognized test kit as defined in §745.83 and *following the kit manufacturer’s instructions*, has tested each component....” 40 C.F.R. § 745.82(a)(2) (emphasis added).

⁴ Additional helpful videos prepared by 3M can be found here: <https://multimedia.3m.com/mws/media/1421741O/why-and-where-to-test-for-lead-chim-frameworks-video.mp4>; <https://multimedia.3m.com/mws/media/1421740O/how-to-3m-leadcheck-swabs.mp4>; and <https://multimedia.3m.com/mws/media/894213O/3m-leadcheck-swabs-demo-video.mp4>.

By indicating that the confirmation card is, itself, a negative test result suggests that Respondent did not conduct the lead test properly or follow the kit manufacturer's instructions.

And RX 1 also indicates that the (a)(2) exception cannot apply here because Respondent failed to test "each component affected by the renovation." *Id.* At most, RX 1 confirms that up to four 3M Lead Check Test swabs were functional. But to test "each component affected by the renovation," *id.*, Respondent would have needed more than four swabs. Respondent's renovation of the Turnagain Property affected the exterior walls, the soffits and eaves, the windows, the internal ceilings, and the interior painted or wallpapered walls. *See, e.g.*, Complainant's Initial Prehearing Exchange at 11-13, 16-17. Each of which would have required a separate swab for Respondent to test each component affected by the renovation. 40 C.F.R. § 745.82(a)(2). *See also*, CX 105. Therefore, even if RX 1 was what Respondent purported it to be, Respondent still did not comply with the terms of the (a)(2) exception.

C. RX 1 does not meet the recordkeeping requirements of the RRP Rule

And Respondent has not complied with the documentation requirements of the RRP Rule, *see* 40 C.F.R. § 745.86, in order to establish that it actually conducted lead tests on the Turnagain Property.

"Firms performing renovations must retain and, if requested, make available to EPA all records necessary to demonstrate compliance with [the RRP Rule] for a period of 3-years following the completion of the renovation." 40 C.F.R. § 745.86(a). Records that must be retained include, where applicable, "Records prepared by a certified renovator after using EPA-recognized test kits, [as described in 40 C.F.R. § 745.82(a)], including an identification of the manufacturer and model of any test kits used, a description of the components that were tested including their locations, and the result of each test kit used." 40 C.F.R. § 745.86(b)(1)(ii).

Here, on the back side of the test confirmation card Respondent wrote "Turnagain Project 05/18." This seems to indicate that Respondent allegedly performed the lead test on either May 18 or during the month of May 2018. But Respondent did not identify the model of the test kits it claims it

used, did not describe the components that were purportedly tested or the locations of those components, and did not record the result of each test kit used. *Id.* Therefore, RX 1 does not contain, and is not otherwise accompanied by, the information required by 40 C.F.R. § 745.86(b)(1)(ii). Respondent’s Prehearing Exchange at 1.

40 C.F.R. § 745.87(e) provides that “lead-based paint is assumed to be present at renovations covered by” the RRP Rule. To overcome that assumption, it is incumbent upon Respondent to show that the exceptions in 40 C.F.R. § 745.82(a) apply. Respondent could have done so by complying with the requirements of 40 C.F.R. § 745.82(a)(2) and properly documenting that compliance as required by 40 C.F.R. § 745.86(b)(1)(ii). Respondent failed to meet those requirements, and as such, RX 1 does not verify that Respondent complied with the RRP Rule, or that Respondent’s renovation of the Turnagain Property was not subject to the RRP Rule under the (a)(2) exception.

D. Additional Exhibits Complainant Intends to Proffer

To effectively rebut the validity of RX 1, Complainant intends to proffer the following exhibits:

Exhibit Number	Description
CX 103	“3M Lead Check Swabs: Test Method for Painted Wood and Metal Surfaces” video, available at https://multimedia.3m.com/mws/media/894181O/3m-leadcheck-swabs.mp4
CX 104	Physical example of a 3M Lead Check Test Kit
CX 105	3M Lead Check Swab Instruction Manual

III. ADDITIONAL DOCUMENTATION REQUIRED TO BE SUBMITTED

In its February 3, 2021 Prehearing Order, this Tribunal instructed Respondent to submit the following as part of its Prehearing Exchange:

- (A) A copy of any documents in support of the denials made in its Answer;
- (B) A copy of any documents in support of any asserted affirmative defenses and an explanation of the arguments in support of any such affirmative defenses;
- (C) All factual information that Respondent considers relevant to the assessment of a penalty and any supporting documentation; and

(D) If Respondent takes the position that the proposed penalty should be reduced or eliminated on any ground, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position.

February 3, 2021 Prehearing Order at 3.

Complainant notes that Respondent failed to provide anything in its prehearing exchange related to these topics, with the sole exception of RX 1. As such, Complainant reads this as Respondent stating that it has no documents to support the denials made in its Answer or the Affirmative Defenses alluded to in its Answer; that it does not consider any additional factual information relevant to the assessment of a penalty; and that it does not believe that the proposed penalty should be reduced or eliminated on any ground, including on inability to pay grounds. Therefore, Complainant believes that this Tribunal should estop Respondent from attempting to further introduce any such physical or documentary evidence, raising any additional factual information related to the assessment of a penalty, or arguing on any grounds, including ability to pay, that the penalty should be reduced or eliminated.

A. Respondent's alleged State certification is unsupported and immaterial

Respondent has implied that it cannot be held liable for violating the RRP Rule, as it obtained training required by the State of Alaska.⁵ See Respondent's Prehearing Exchange at 2. But, other than a brief mention in its prehearing exchange relating to whether Complainant has treated Respondent fairly, *id.*, Respondent has not supported this assertion at all. Notably missing from Respondent's prehearing

⁵ Complainant reads Respondent's assertion as arguing that Mr. von Marees took some sort of renovator training required by the State of Alaska. It should be undisputed, here, that Respondent was not firm certified by EPA, pursuant to 40 C.F.R. § 745.89 prior to the July 25, 2018 inspection. CX 11, 12. Renovator certification and firm certification are distinct requirements. Respondent needed to be EPA firm certified prior to offering to perform or performing renovations for compensation in target housing. 40 C.F.R. §§ 745.81(a)(2)(ii), 745.89. A certified renovator had to oversee Respondent's renovation of target housing and, among other things, ensure that the workplace standards of 40 C.F.R. § 745.85 are followed. 40 C.F.R. § 745.90(b).

exchange is any proof that it completed any relevant training, that it is actually certified by the State of Alaska, or what that training entailed.

But, to be clear, even if Respondent had been able to offer any documentation to support its argument that it was certified by the State of Alaska prior to the inspection of the Turnagain Property, that still would have been immaterial. “To become a certified renovator . . . an individual must successfully complete the appropriate course accredited by EPA under §745.225 or by a State or Tribal program that is authorized under subpart Q of this part.” 40 C.F.R. § 745.90. Respondent did not take an EPA-accredited training course until after the July 25, 2018 inspection. *See* CX 12. And while states can apply to EPA for authorization to administer and enforce the Lead Based Paint Program, *see* 40 C.F.R. § 745.320, Alaska is not authorized to do so. *See* 40 C.F.R. Part 745 Subpart Q. Therefore, any requirements that the State of Alaska places on Respondent are separate and distinct from any requirements that the RRP Rule places on Respondent. So, even if Respondent had completed an Alaska-accredited training course, if Respondent did not also take an EPA-accredited training course, it did not comply with the RRP Rule.

IV. A NOTE ON RESPONDENT’S “STATEMENT OF CONCERN AND UNFAIR TREATMENT”

Complainant’s primary objective throughout these proceedings is to protect human health, and in particular, children’s health, while enforcing the law in a fair and impartial manner. Complainant believes that it has approached its interactions with Respondent in a fair and equitable manner, and that the documents Complainant has filed in these proceedings demonstrate that.

Complainant has spent years trying to assist Respondent to come into compliance with its responsibilities under TSCA and the RRP Rule. *See, e.g.*, CX 80-86. While Respondent may feel that it is being made an example of, to Complainant, the documents filed in this matter tell a very different story: That Respondent has been given every opportunity to comply but chose time and again to ignore those warnings.

And while Complainant recognizes that Respondent is a small business, that is no excuse for violating the law. Respondent has not provided sufficient documentation to support how its status as a small business indicates that the penalty in this matter should be lowered or forgiven. Complainant has repeatedly offered to analyze Respondent's ability to pay a civil penalty, *see, e.g.*, Complainant's February 25, 2021 Motion; Complainant's Initial Prehearing Exchange at 33-34, 40-41; CX 99, but Respondent has not provided Complainant with sufficient information to do so.

V. RESERVATION OF RIGHTS

Complainant respectfully reserves the right to call all witnesses called by 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 Respondent and this Tribunal.

Respectfully submitted,

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 Rebuttal Prehearing Exchange**, dated May 24, 2021 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:
Mr. and Mrs. Rodrigo and Kari von Marees
GreenBuild Design & Construction, LLC
rad@greenbuild.us.com
kad@greenbuild.us.com
For Respondent

Dated: May 24, 2021
Seattle, Washington

Respectfully submitted,

Andrew Futerman
Counsel for Complainant
EPA Region 10