**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

| | | |
|---|---|---|
| **In the Matter of:** | **)** | |
| | **)** | |
| **LHP, LLC,** | **)** | **Docket No. TSCA-07-2014-0029** |
| | **)** | |
| **Respondent.** | **)** | |

# ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

## I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA"), Chief of the Toxics and Pesticides Branch, Region 7 ("Complainant"), initiated this proceeding on May 29, 2014, by filing a Complaint ("Compl.") against LHP, LLC ("Respondent"), pursuant to the authority granted in 15 U.S.C. § 2615(a).[1] The Complaint alleges five counts of violation of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601–2697, arising from Respondent's alleged renovation activities at a residential property located at 800 A Street, in Lincoln, Nebraska on November 9, 2012. For these alleged violations, the Complaint seeks the imposition of civil penalties against Respondent in the amount of $26,840.

Respondent, through counsel, filed an Answer on March 25, 2015. In its Answer, Respondent denies each of the five counts of violation alleged in the Complaint, and requests that the Complaint be dismissed with prejudice and judgment be entered in its favor with costs awarded.[2]

The parties participated in this Tribunal's Alternative Dispute Resolution process from April 10, 2015, through July 10, 2015, on which date Chief Administrative Law Judge Susan L. Biro was designated to preside. On July 29, 2015, a Prehearing Order was issued directing the parties to file and serve prehearing exchanges. Consistent therewith, Complainant submitted an Initial Prehearing Exchange ("C. PHE") on September 3, 2015, with Complainant's proposed exhibits ("CX") 1-45; Respondent submitted its Prehearing Exchange on September 28, 2015, with Respondent's proposed exhibits ("RX") 1-2; and Complainant filed a Rebuttal Prehearing Exchange on October 8, 2015, with CX 46.

[1] Although the Complaint was filed on May 29, 2014, the parties have stipulated that Respondent was not served with the Complaint until February 19, 2015.

[2] Notably, Respondent did not file a motion to dismiss the Complaint to accompany this request in its Answer.

A Notice of Hearing and Scheduling Order was issued on October 26, 2015, setting November 20, 2015, as the deadline to file any dispositive motion regarding liability, such as a motion under 40 C.F.R. § 22.20(a). On November 17, 2015, I was designated to preside over this matter. Respondent filed a Motion for Summary Judgment ("Summ. J. Mot.") on November 23, 2015, following the deadline to file any dispositive motion regarding liability.[3] Complainant filed a Response to Respondent's Motion for Summary Judgment ("Response" and "Resp.") on December 7, 2015, opposing Respondent's Motion for Summary Judgment on substantive grounds.

As Respondent's Motion for Summary Judgment is a dispositive motion regarding liability, properly considered under 40 C.F.R. § 22.20(a), this motion untimely.[4] Further, Respondent's Motion for Summary Judgment was not accompanied by a motion for leave to file out of time. Accordingly, denial of Respondent's Motion for Summary Judgment is appropriate on procedural grounds for untimely filing. Nevertheless, I have considered the substantive merits of this motion in making this ruling, as well as the related substantive arguments raised by the parties, which did not include the issue of timeliness.

The hearing in this matter is currently scheduled to begin on March 22, 2016, in Lincoln, Nebraska. In preparation for the hearing, the parties submitted a Joint Set of Stipulated Facts, Exhibits, and Testimony ("Joint Stips."). Additionally, each party filed a motion to supplement its prehearing exchange on February 19, 2016.

## II. FACTUAL BACKGROUND

Respondent is a limited liability company authorized under the laws of the state of Nebraska. Compl. ¶¶ 4, 21; Answer ¶¶ 4, 21; Joint Stips. at I, ¶ 2. During all times referenced in the Complaint, Respondent was in the business of owning and renting residential housing in the Lincoln, Nebraska area, Joint Stips. at I, ¶ 3, and was a certified renovator, Compl. ¶ 22; Answer ¶ 22. Respondent owned a residential property located at 800 A Street, Lincoln, Nebraska ("Property"), Joint Stips. at I, ¶ 6, and was performing a renovation project at this location in November 2012, Joint Stips. at I, ¶ 8; *see also* Compl. ¶ 22; Answer ¶ 22. The Property was constructed prior to 1978. Compl. ¶ 25; Answer ¶ 25; Joint Stips. at I, ¶ 7.

In the Complaint, Complainant asserts that the renovation project performed by Respondent at the Property was renovation for compensation, subject to regulations for lead-based paint activities contained in 40 C.F.R. Part 745, Subparts E and L. Compl. ¶¶ 7, 23. The Complaint states that Region 7 of the EPA conducted a work practice inspection of the Property

[3] The procedural rules governing this proceeding, set forth at 40 C.F.R. Part 22, state that "[a] document is filed when it is received by the appropriate clerk." 40 C.F.R. § 22.5. Respondent's Motion for Summary Judgment was mailed by commercial delivery service on November 20, 2015, but was not received by the Headquarters Hearing Clerk until November 23, 2015. As a result, Respondent's Motion for Summary Judgment was not filed until November 23, 2015, and is untimely.

[4] *See infra* p. 3 (discussing the appropriate standard for review of Respondent's Motion for Summary Judgment).

on November 9, 2012, to evaluate Respondent's regulatory compliance. Compl. ¶ 24. The Complaint alleges that Respondent was performing renovation at the time of inspection, and that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, by failing to comply with regulatory provisions in 40 C.F.R. § 745.85 pertaining to work practice standards for renovation activity. Compl. ¶¶ 30-31, 36-37, 40-41, 44-45, 48-49. Specifically, the Complaint alleges that at the time of inspection, Respondent (1) failed to post or maintain posted signs in violation of 40 C.F.R. § 745.85(a)(1) (Count One); (2) failed to close all doors and windows within 20 feet of the renovation in violation of 40 C.F.R. § 745.85(a)(2)(ii)(A) (Count Two); (3) failed to ensure that doors being used in the work area were covered in plastic sheeting or other impermeable material in violation of 40 C.F.R. § 745.85(a)(2)(ii)(B) (Count Three); (4) failed to cover the ground with plastic sheeting or other disposable impermeable material in violation of 40 C.F.R. § 745.85(a)(2)(ii)(C) (Count Four); and (5) failed to contain waste from renovation activities and prevent release of dust and debris before waste was removed from the work area in violation of 40 C.F.R. § 745.85(a)(4)(i) (Count Five). Compl. ¶¶ 30-31, 36-37, 40-41, 44-45, 48-49.

In its Answer, Respondent admits that it was a certified firm performing renovations on the Property. Answer ¶ 22. Respondent, however, denies that the renovation project at the Property was a renovation for compensation subject to regulations contained in 40 C.F.R. Part 745, Subparts E and L. Answer ¶ 23. Respondent further denies that at the time of the inspection on November 9, 2012, it violated regulatory provisions in 40 C.F.R. § 745.85, as alleged in Counts One through Five of the Complaint. Answer ¶¶ 30-31, 34-35, 38-39, 42-43, 46-47.

## III. STANDARD FOR REVIEW

This proceeding is governed by 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 ("Rules of Practice"). The Rules of Practice do not provide for summary judgment, as addressed by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). However, accelerated decision under the Rules of Practice, provided for at 40 C.F.R. § 22.20, is comparable to summary judgment under Rule 56 of the FRCP. *See ICC Industries, Inc.*, 1991 EPA App. LEXIS 13, at *16 (CJO Dec. 2, 1991) ("An accelerated decision is comparable to a summary judgment under Federal Rule of Civil Procedure 56, which by analogy provides guidance."). Accordingly, Respondent's Motion for Summary Judgment is appropriately considered under the standard for accelerated decision under the Rules of Practice.

With regard to accelerated decision, the Rules of Practice provide that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). As the standard for accelerated decision under 40 C.F.R. § 22.20(a) is reflective of the standard for summary judgment under Rule 56 of the FRCP, jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148

(1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental Appeals Board has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g., Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The governing substantive law determines which facts are material for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A factual dispute is genuine if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Id*. The United States Supreme Court has held that no genuine issue as to any material fact exists where a party bearing the burden of proof in a proceeding "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In such cases, the party's failure of proof on the essential element "necessarily renders all other facts immaterial." *Id*. at 323.

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

In considering a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49.

Applying the jurisprudence for summary judgment to the present matter, Respondent, as the party moving for accelerated decision, bears the initial responsibility of informing this Tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323. However, if Complainant, as the party bearing the ultimate burden of proof in this proceeding pursuant to 40 C.F.R. § 22.24, fails to make a showing sufficient to establish the existence of an element essential to its case against Respondent, accelerated decision for Respondent is appropriate. *See id.* at 322-23.

## IV. GOVERNING SUBSTANTIVE LAW

Pursuant to the authority granted by TSCA, within 15 U.S.C. § 2682, the EPA promulgated and amended regulations in Subparts E and L of 40 C.F.R. Part 745 "to address lead-based paint hazards created by renovation, repair, and painting activities . . . that disturb lead-based paint in target housing and child-occupied facilities." Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21,692, 21,693 (Apr. 22, 2008). These regulations, referred to collectively as the "Renovation, Repair, and Painting Rule," ("RRP Rule"), set forth work practice standards for renovation activity applicable, with some exceptions, "to all renovations performed for compensation in target housing and child-occupied facilities." 40 C.F.R. § 745.82; *see also* 40 C.F.R. § 745.85 (setting forth the relevant work practice standards).

Pertinent to the RRP Rule, TSCA defines "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities . . . or any 0-bedroom dwelling." 15 U.S.C. § 2681(17). The RRP Rule defines "renovation" as "the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces," and specifically states that this definition includes, among other activities, "[t]he 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))." 40 C.F.R. § 745.83. The RRP Rule, however, expressly excludes "minor repair and maintenance activities" from the definition of "renovation." 40 C.F.R. § 745.83. The term "minor repair and maintenance activities," as defined by the RRP Rule, encompasses activities that disrupt "20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by [40 C.F.R.] § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas." 40 C.F.R. § 745.83.

In promulgating the RRP Rule, the EPA specified that the term "compensation" includes "rent for target housing." 73 Fed. Reg. at 21,707. In so doing, the EPA reasoned that "[a]lthough the owner of rental property may not be compensated for maintenance and repair work at the time that the work is performed, tenants generally pay rent for the right to occupy rental space as well as for maintenance services in that space." 73 Fed. Reg. at 21,707-08.

The work practice standards for renovation activity, established by the RRP Rule at 40 C.F.R. § 745.85(a), place specific requirements on the performance of both interior and exterior renovation, and otherwise prohibit and restrict certain work practices for applicable renovation activity. Additionally, the RRP Rule establishes requirements for cleaning the work area following applicable renovation, and sets forth standards for performing post-cleaning

verification for interior and exterior renovation. *See* 40 C.F.R. § 745.85 (a)(5)-(b) (establishing requirements for cleaning and performing post-cleaning verification for applicable renovation activity).

Violations of the RRP rule are prohibited by TSCA, at 15 U.S.C. § 2689, which provides that it is unlawful for any person to fail to comply with any rule issued under the statutory provisions in 15 U.S.C. §§ 2681–2692, pertaining to lead exposure reduction. TSCA further provides that a person shall be liable for a civil penalty for each violation of the prohibition in 15 U.S.C. § 2689.[5] 15 U.S.C. § 2615(a)(1).

## V. PARTIES' ARGUMENTS

In support of its Motion for Summary Judgment, Respondent argues that the "Complaint has no factual basis and, without proof of the validity of the violation, there is no case and the Court should enter summary judgment with respect to the claim." Summ. J. Mot. at 4. Respondent asserts that the requirements of the RRP Rule do not apply to the activity performed by Respondent on November 9, 2012, the date of inspection. Summ. J. Mot. at 4-5. Respondent argues that "[i]n order for there to have been a violation, the rules would have had to apply." Summ. J. Mot. at 5. Respondent posits that at the time of inspection, "debris was being collected and occasional final painting and touchup work was being done" on the Property. Summ. J. Mot. at 2. Such activity, Respondent asserts, does not constitute renovation activity. Summ. J. Mot. at 4-5. Therefore, Respondent argues that the requirements of the RRP Rule do not apply, and that it cannot be found to have violated such regulatory requirements on November 9, 2012. Summ. J. Mot. at 4-5.

Respondent acknowledges that Paul Clark ("Inspector Clark"), the inspector performing the inspection on November 9, 2012, reported witnessing workers at the Property scraping paint. Summ. J. Mot. at 4-5. However, Respondent asserts that Inspector Clark's report regarding paint scraping during the inspection is a "false statement," to which "there is no additional corroborating testimony or evidence." Summ. J. Mot. at 5. Respondent additionally argues that Inspector Clark "omitted pertinent facts" in his report of his inspection of the Property, and that "[n]one of the pictures in the report show anyone scraping paint." Summ. J. Mot. at 5. Instead, Respondent suggests that a photograph taken in association with the inspection of the Property on November 9, 2012,[6] shows workers applying the final coat of paint on a white portion of the house, an area previously depicted as "grey concrete blocks" in a photograph of the house prior

[5] TSCA, at 15 U.S.C. § 2615(a)(1), specifies a civil penalty "in an amount not to exceed $25,000" for each violation of the prohibition in 15 U.S.C. § 2689. However, adjusting for inflation, the maximum penalty amount has been increased to $37,500 for penalties effective after January 12, 2009. 40 C.F.R. § 19.4.

[6] Notably, Respondent refers to the photograph discussed here simply as "[t]he picture that the EPA took on November 9, 2012," and does not more specifically identify the particular piece of photographic evidence to which it is referring. Summ. J. Mot. at 5.

to the inspection on November 9, 2012.[7] Summ. J. Mot. at 5. Respondent concedes that there were "debris and paint scrapings on the ground" of the Property at the time of inspection, Summ. J. Mot. at 5, but asserts that such were part of the preexisting condition of the Property prior to its purchase by Respondent, and not attributable to work performed by Respondent, Summ. J. Mot. at 1, 4-5.

In furtherance of its Motion for Summary Judgment, Respondent submitted an affidavit from David Fiala ("Fiala"), a manager for Respondent, as "Group Exhibit A" ("SJX A"), and an article discussing the inspection of the Property and related events, with the inclusion of photographs of the Property and a copy of a letter from the purported real estate agent executing the sale of the Property to Respondent, as "Group Exhibit B" ("SJX B").[8] In his affidavit, Fiala asserts that no scraping was performed on the Property on November 9, 2012, and that there were paint chips and debris on the Property from the time of purchase in September 2012, until cleanup was performed on November 9, 2012, and days following.[9] SJX A at ¶¶ 2-3. Fiala further states in his affidavit that he was not informed of the content of the report on the inspection until 2013, and that the report does not include additional information he provided at the inspection and contains many items that "have no basis in fact." SJX A at ¶¶ 8-9. Likewise, the article submitted by Respondent in SJX B, which does not identify its author, states that Respondent was not scraping paint upon inspection. SJX B at 2, 9, 11. Instead, the article suggests that workers were painting the house on the Property on the date of the inspection, SJX B at 2, 9, and compares a photograph purportedly taken in early 2012, depicting concrete blocks at the foundation of the house, with a photograph purportedly taken during the investigation depicting freshly painted concrete blocks at the foundation of the house, SJX B at 2. The article argues that paint chips and debris on the ground of the Property at the time of the inspection, which were photographed by Inspector Clark, were the result of accumulation from years of prior neglect. SJX B at 2-4, 10-11. The article additionally contains a copy of a letter dated October 8, 2013, which purports to be from Anita Rockenbach, the real estate agent executing the sale of the Property to Respondent, stating that the house on the Property "did have the majority of the exterior paint with missing, pealing or chipping paint at the time of the sale." SJX B at 5.

---

[7] With regard to the photograph referenced by Respondent as depicting a portion of the house as "grey concrete blocks," Respondent indicates that this picture is in the possession of David Fiala, and that it shows a portion of the house before the inspection on November 9, 2012, but Respondent does not more specifically identify the photograph to which it is referring. Summ. J. Mot. at 5.

[8] Respondent references "multiple affidavits" submitted in support of its Motion for Summary Judgment. Summ. J. Mot. at 6. Respondent, however, only submitted the affidavit of Fiala in support of its Motion for Summary Judgment. *See* SJX A (reflecting the affidavit of Fiala).

[9] The affidavit of Fiala references an "included recording of a phone call" with an EPA hotline, but no such recording was submitted with the affidavit or Motion for Summary Judgment. *See* SJX A at ¶ 10.

In response to Respondent's Motion for Summary Judgment, Complainant argues both that Respondent, in so moving, has failed to establish the absence of a genuine issue of material fact, and that it has provided affirmative evidence in its prehearing exchange submissions that a genuine issue of material fact exists in this matter. Resp. at 8, 10-11. For these reasons, Complainant asserts that Respondent's Motion for Summary Judgment should be denied.[10] *See* Resp. at 8, 14.

Complainant asserts that Respondent's Motion for Summary Judgment is premised upon the legal conclusion that "no regulated 'renovation' activities were occurring at the work site in question on November 9, 2012." Resp. at 8. Complainant argues that Respondent has asserted "allegations of fact that either find no basis in the evidence or lead to illogical and irrelevant conclusions" in furtherance of its argument that no regulated renovation activities were occurring on November 9, 2012. Resp. at 10. Specifically, Complainant argues that Respondent's factual assertion that its workers were touching up painted surfaces and cleaning up the work site on the Property on November 9, 2012, does not support the conclusion that only these activities were being performed on that date, Resp. at 9-10, and that "Respondent provides no evidence to support its contention that [its] workers were engaged exclusively in non-regulated activities at the time of the inspection," Resp. at 9. Complainant asserts that the exhibits provided by Respondent in support of its Motion for Summary Judgment (SJX A-B) are not probative of the activities that occurred during the inspection, as Fiala was not present during the inspection, and therefore, his affidavit in SJX A cannot properly address such activities, and the materials in SJX B are "unsigned and unsworn." Resp. at 9. Additionally, Complainant argues that the factual assertions made by Respondent relating to the state of the foundation of the home and the presence of paint chips at the time of Respondent's purchase of the Property, do not prove that regulated renovation activities were not occurring on November 9, 2012. Resp. at 9-10. As a result, Complainant urges that Respondent has not established that regulated activities did not occur on the date of inspection, and, therefore, has failed to establish the absence of a genuine issue of material fact. Resp. at 9-10.

Complainant further argues that it has provided affirmative evidence in its prehearing exchange submissions that a genuine issue of material fact exists with regard to whether or not regulated renovation activities were occurring on the Property on November 9, 2012. Resp. at 10-11. In support of its argument, Complainant states that it presented in its prehearing exchanges, "substantial, probative evidence tending to demonstrate that Respondent was engaged in regulated renovation activities on the date of inspection," consistent with the allegations in the Complaint. Resp. at 12. Complainant asserts that such evidence includes the inspection report of Inspector Clark, CX 1, and photographic evidence, in CX 3-41, which reflects the Property as it appeared to Inspector Clark during his inspection on November 9, 2012.[11] Resp. at 12-13. Complainant indicates that Inspector Clark's inspection report documents his observation of

[10] Notably, at times in its Response, Complainant refers to Respondent's Motion for Summary Judgment as a motion for accelerated decision, although it is not titled as such. *See e.g.*, Resp. at 8, 11, 13.

[11] The parties have stipulated that photographs submitted in CX 3-41 are photographs taken by Inspector Clark at the Property on November 9, 2012. Joint Stips. at II, ¶ 1.

workers scraping paint from the house on the Property, and an admission from Mynor Herrera ("Herrera"), an on-site crew leader, that he instructed his workers to scrape paint on the home on the date of inspection. Resp. at 13. Complainant further claims that photographic evidence in CX 8 corroborates Inspector Clark's report that workers were scraping paint at the date and time of his inspection. Resp. at 13. Complainant concludes that with such evidence, it has demonstrated a genuine dispute of material fact in the matter, and therefore, Respondent should be denied accelerated decision. Resp. at 13-14.

## VI. DISCUSSION

Respondent's Motion for Summary Judgment hinges on its contention that the Respondent was not performing renovation activity regulated by the RRP Rule on November 9, 2012, and therefore, that it cannot be found to have violated the RRP Rule on this date, as alleged in the Complaint. *See* Summ. J. Mot. at 4-5. In asserting this argument, Respondent suggests that Complainant has failed to establish a factual basis for its allegation that Respondent was performing renovation activity governed by the RRP Rule on November 9, 2012. *See* Summ. J. Mot. at 4-5. Contrary to Respondent's arguments, however, the record reflects a genuine issue of material fact with regard to whether Respondent performed renovation activity regulated by the RRP Rule on November 9, 2012.

The issue of whether Respondent performed renovation activity regulated by the RRP Rule on November 9, 2012, is material to this matter, because performance of such renovation activity is prerequisite to the applicability of the RRP Rule, upon which the violations in the Complaint are predicated. *See supra* p.4; *Anderson*, 477 U.S. at 248 (discussing which facts are material for summary judgment). Further, the evidence of record reflects a genuine dispute with regard to this issue, because a reasonable factfinder could find for Complainant, the nonmoving party, based upon the evidence. *See supra* p.4; *Anderson*, 477 U.S. at 248 (addressing when a factual dispute is genuine). Accordingly, it would be inappropriate, on substantive grounds, to grant accelerated decision upon Respondent's Motion for Summary Judgment.

The Complaint alleges that Respondent was performing renovation at the time of the inspection on November 9, 2012, and that Respondent violated 15 U.S.C. § 2689 by failing to comply with regulatory provisions in 40 C.F.R. § 745.85 pertaining to work practice standards for renovation activity. Compl. ¶¶ 22, 30-31, 36-37, 40-41, 44-45, 48-49. In its Initial Prehearing Exchange, Complainant identifies three pieces of evidence to support its allegation that Respondent was performing renovation activity at the time of the inspection: (1) the observation of Inspector Clark that two workers were scraping paint on certain portions of the Property on the date of the inspection, reflected in his inspection report in CX 1; (2) photographs from the day of inspection showing workers scraping paint in CX 8 and CX 28;[12] and (3) the statement of Respondent's maintenance crew leader to Inspector Clark that he had noticed peeling paint on the date of the inspection and had his workers scrape the peeling paint,

[12] As discussed below, the photograph in CX 8 depicts two individuals crouching alongside the base of a house, and the photograph in CX 28 depicts a window with portions of missing paint on the window frame.

documented in CX 1. C. PHE at 7-10. In identifying such evidence, Complainant notably asserts that pursuant to 40 C.F.R. § 754.83, "[s]craping paint is a renovation activity." C. PHE at 7-10.

In reviewing the evidence of Complainant upon Respondent's Motion for Summary Judgment, it is to be believed, and all justifiable inferences from such evidence are to be drawn in Complainant's favor. *See supra* p.4; *Anderson*, 477 U.S. at 255 (discussing the standard for reviewing the evidence of the nonmoving party in considering a motion for summary judgment). Considering the Complainant's evidence in this light, Complainant has made a showing sufficient to support its allegation that Respondent was performing renovation regulated by the RRP Rule at the time of the inspection on November 9, 2012, with the evidence it submitted in its Initial Prehearing Exchange.

In his report of the inspection of the Property on November 9, 2012, Inspector Clark states that he "observed three workers at the house conducting regulated work," and further reports that "[t]wo workers were observed scraping paint at the base of the west side of the house and a window at the south west corner on the west side of the house." CX 1 at 6. Additionally, in his report, Inspector Clark states that Herrera, a maintenance crew leader on the Property employed by Respondent, reported that he had noticed old paint was peeling on the date of the inspection, and had workers employed by Respondent scrape the peeling paint. CX 1 at 6. According to Inspector Clark's inspection report, Herrera further reported that the workers performed scraping on the day prior to the investigation, and affirmed that "they had scraped the entire house." CX 1 at 6.

In conjunction with his narrative statements regarding the inspection, Inspector Clark submitted photographs of the Property taken during the inspection in his report. *See* CX 1 at 26-27, 28-30; CX 8; CX 28 (reflecting photographs and a list containing descriptions of such photographs).[13] These photographs include a photograph labeled "DSCN0238," depicting two individuals crouching alongside the base of a house, which Inspector Clark reported reflects "[w]orkers scraping paint from the base of the house." CX 1 at 26, 28; CX 8. Likewise, the report includes a photograph labeled "DSCN0258," depicting a window with portions of missing paint on the window frame, which Inspector Clark reported reflects a "[w]indow that [a] worker was observed scraping." CX 1 at 26, 29; CX 28.

In addition to the information contained in Inspector Clark's report and associated photographs, Complainant, in its Initial Prehearing Exchange, identifies Inspector Clark as a proposed witness. C. PHE at 1. Complainant asserts that Inspector Clark will provide testimony on his observations of the work site during his inspection and the statements made during the inspection. C. PHE at 1.

[13] As previously noted, the parties have stipulated that photographs submitted in CX 3-41, including the photographs in CX 8 and CX 28, are photographs taken by Inspector Clark at the Property on November 9, 2012. Joint Stips. at II, ¶ 1.

If the aforementioned evidence of Complainant is believed, and all justifiable inferences from such evidence are drawn in its favor, such evidence could lead to the conclusion that on the date of the inspection, Respondent's workers were scraping paint from the house on the Property. The RRP Rule specifically includes "scraping" as "[t]he removal, modification or repair of painted surfaces or painted components" encompassed within its definition of renovation. *See* 40 C.F.R. § 745.83 (defining the term "renovation"). Therefore, as considered upon Respondent's Motion for Summary Judgment, Complainant's evidence sufficiently supports its allegation that Respondent was performing renovation activity regulated by the RRP Rule on November 9, 2012, the date of the inspection.[14]

Respondent, in supporting its Motion for Summary Judgment, has failed to meet its burden to identify materials in the record demonstrating the absence of a genuine issue of material fact. *See supra* p.4; *Celotex Corp.*, 477 U.S. at 323 (addressing the responsibility of the movant for summary judgment). Further, Respondent's argument that there is no evidence of paint scraping "outside of" Inspector Clark's report, Summ. J. Mot. at 4-5, could be construed as a concession that this report contains evidence of paint scraping, contrary to its assertion that Complainant has failed to establish a factual basis for its allegation that Respondent was performing renovation activity governed by the RRP Rule on November 9, 2012.

Additionally, none of the evidence submitted by Respondent in support of its Motion for Summary Judgment demonstrates the absence of a genuine issue of material fact in this matter. While Fiala's statement in his affidavit that "[o]n November 9, 2012, there was no scraping being done" at the Property, SJX A at ¶ 4, contradicts Complainant's evidence from Inspector Clark that paint scraping was occurring on the date of the inspection, this contradiction highlights the existence of a genuine issue of material fact with regard to whether Respondent performed renovation activity on November 9, 2012. Likewise, the evidence presented in Fiala's affidavit in SJX A and the article in SJX B regarding the application of paint to the foundation of the house on the Property and the existence of debris and paint scrapings on the ground of the Property prior to Respondent's purchase, do not demonstrate the absence of a genuine issue of material fact, but rather tend to reflect the existence of a genuine dispute as to whether

[14] Notably, the definition of renovation in the RRP Rule excludes "minor repair and maintenance activities," which encompasses activities that disrupt "20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by [40 C.F.R.] § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas." 40 C.F.R. § 745.83. However, considering (and drawing justifiable inferences from) Complainant's evidence, including Inspector Clark's statement that he "observed three workers at the house conducting regulated work," upon inspection, CX 1 at 6; Inspector Clark's report of observing workers scraping paint at two places on the house upon inspection, CX 1 at 6; and Inspector Clark's statement that at the time of inspection, Herrera affirmed that workers had scraped the entire house, CX 1 at 6; along with the proposed testimony of Inspector Clark regarding his observations of the work site during his inspection and the statements made during the inspection, C. PHE at 1, Complainant has made a showing sufficient to support its allegation that Respondent was performing activity within the definition of renovation in the RRP Rule at the time of the inspection on November 9, 2012, and there remains a genuine issue of material fact on this issue.

Respondent performed renovation activity on November 9, 2012. Finally, the assertion that Inspector Clark's report contains false information, and otherwise omits information, made by Respondent in its Motion for Summary Judgment, *see* Summ. J. Mot. at 4-5, and further reflected in Fiala's affidavit in SJX A and the article in SJX B, *see* SJX A at ¶ 9; SJX B at 2, 9, 11, does not demonstrate the absence of a genuine issue of material fact in this matter. Rather, the credibility of Inspector Clark, and the reliability of his inspection report, are proper issues for Respondent to address at the hearing.

As Respondent has failed to demonstrate the absence of a genuine issue of material fact in this matter in support of its Motion for Summary Judgment, and further, the record reflects a genuine issue of material fact with regard to whether Respondent performed renovation activity regulated by the RRP Rule on November 9, 2012, it would be inappropriate, on substantive grounds, to grant accelerated decision upon Respondent's Motion for Summary Judgment. Considering Respondent's untimely filing of its Motion for Summary Judgment, denial of this motion is therefore appropriate on both procedural and substantive grounds.

## VII. ORDER

Respondent's Motion for Summary Judgment is hereby **DENIED**.

**SO ORDERED.**

Christine Donelian Coughlin
Administrative Law Judge

Dated: March 11, 2016
Washington, D.C.

***In the Matter of LHP, LLC***, Respondent.
Docket No. TSCA-07-2014-0029

**Certificate of Service**

I hereby certify that copies of this **ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**, issued by Christine Donelian Coughlin, Administrative Law Judge, on this 11th day of March 2016, were sent to the following in the manner indicated.

Chronnia L. Warren
Paralegal

Dated: **January 21, 2016**
**Washington, D.C.**

**Original and One Copy by Hand Delivery and Electronic Mail:**

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Ave., NW
Washington, DC 20460

**Copy by Electronic and Regular Mail To:**

Robert W. Richards, Esq.
Assistant Regional Counsel
U.S. EPA, Region VII
11201 Renner Boulevard
Lenexa, KS 66219
Email: richards.robert@epa.gov

Cynthia M. Rote, Esq.
Delaney Law, PC
Managing Partner
444 North Wabash Avenue, 3rd Flr.
Chicago, IL 60611
Email: cynthia@delaney-law.com