

**U.S. ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS**

**BEFORE THE ADMINISTRATOR**

**In the Matter of:**

**LHP, LLC,**

**Respondent.**

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**Docket. No. TSCA-07-2014-0029**

**COMPLAINANT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE**

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. §§ 22.16(a) and 22.19(f), Complainant, the United States Environmental Protection Agency, Region 7 ("EPA" or "the Agency"), hereby requests to supplement and amend Complainant's Initial Prehearing Exchange ("Prehearing Exchange") with the addition of Complainant's Exhibits ("CX") 47 through 52 and provision of an updated Agency URL and correct Delegation of Authority.

Complainant contacted Respondent to determine whether Respondent objects to the granting of the relief sought in this Motion, and the Respondent informed Complainant that Respondent would have to see the photos and enforcement history prior to advising on objections, Respondent does not object to relevant delegation authority provided it is not case specific to Respondent, and Respondent has no objection to the correct URL.

The regulation at 40 C.F.R. § 22.19(f) governs supplementation of a prehearing information exchange, providing as follows:

- A party who has made an information exchange under paragraph (a) of [section 22.19] . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

The Consolidated Rules of Practice allow for such supplementation of a prehearing exchange under subsection (f) at least fifteen days prior to the hearing date, subject to the discretion of the Presiding Administrative Law Judge. Specifically, 40 C.F.R. § 22.22(a)(1) provides that

[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . . If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all parties as soon as it had control of the information, or had good cause for not doing so.

This provision embodies a policy favoring the admission of all relevant and material evidence, and only prohibits the inclusion of such evidence if it has not been provided to all parties at least fifteen days prior to the hearing.

In the case at bar, Complainant seeks leave to supplement and amend its Prehearing Exchange in four respects. First, Complainant wishes to amend its Prehearing Exchange to provide the Delegation of Authority in effect when EPA filed its Complaint on May 29, 2014. In its Prehearing Exchange filed on September 3, 2015, Complainant's Exhibit 45 provided both National EPA delegations of authority as well as Regional and Divisional delegations for Region 7. Within this exhibit at pages 4 to 5, Complainant inadvertently included an updated National Delegation of Authority that EPA's Office of Enforcement and Compliance Assurance had revised on April 15, 2015. By this motion, Complainant wishes to amend its Prehearing

Exchange by replacing pages 4 and 5 of CX 45 with the Headquarters Delegation of Authority as it existed when Complainant filed its Complaint on May 29, 2014.

Second, Complainant seeks leave to amend its Initial Prehearing Exchange to provide a functional URL for the Revised Interim Final Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule ("ERPP"). The Agency updated its Web site in October 2015, rendering some URLs inoperable, including the Web address provided at page 12 of Complainant's Initial Prehearing Exchange. The ERPP is now available on EPA's Web site at <http://www.epa.gov/enforcement/revise-interim-final-consolidated-enforcement-response-and-penalty-policy-pre>.

Third, Complainant seeks leave to respond to new arguments advanced by Respondent by supplementing its prehearing exchange with pre-renovation photographs of the property in question. On September 3, 2015, EPA filed Complainant's Initial Prehearing Exchange, and on September 28, 2015, Respondent LHP, LLC, filed Respondent's Initial Prehearing Exchange. Respondent thereafter submitted a Motion for Summary Judgment on November 23, 2015, in which it argued that regulated renovation activities had not occurred on the property because the relevant portion of the property was constructed of "grey concrete blocks." Resp.'s Mot. for Summ. Judg. at 5. In support of this claim, Respondent submitted an affidavit executed by David Fiala, the owner and manager of LHP, LLC, as well as a low-quality photocopy of a photograph of the property located at 800 A Street in Lincoln, Nebraska, taken prior to the renovations. In response to this argument, and in light of the poor quality of the photograph that Respondent provided in support of its claim, Complainant requested that Respondent provide a

higher-quality version of the photograph.<sup>1</sup> As of the date of this filing, Respondent has not provided to Complainant a higher-quality version of the photograph as requested. Complainant, therefore, seeks to supplement the record with three images of the property located at 800 A Street in Lincoln, Nebraska, attached hereto as Complainant's Exhibits 47 through 49.<sup>2</sup>

Fourth, and lastly, Complainant seeks leave to supplement its Prehearing Exchange with information concerning Respondent's enforcement history that was recently obtained by the Agency. This information—contained in Complainant's Exhibits 50 through 52—documents previous enforcement actions initiated by EPA as well as the Nebraska Department of Health and Human Services. Documentation from these enforcement actions provides information pertinent to the size, scope, and nature of Respondent's residential property rental business; Respondent's knowledge and awareness of applicable regulatory requirements; and Respondent's past episodes of noncompliance with these regulations, all of which are relevant to the assessment of civil penalties in this action. Additionally, Complainant may rely on the documents identified above during its examination of Respondent's witnesses.

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<sup>1</sup> Complainant made its initial request during a teleconference on December 4, 2015, and reiterated the request by Email sent to Respondent's counsel on January 22, 2016.

<sup>2</sup> As indicated on the individual exhibits, the images were captured in June and August 2012, prior to Respondent's renovation activities, and were last retrieved from Google Maps on January 25, 2016. They are presently available online at the following URLs:

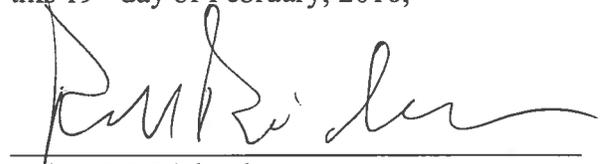
<https://www.google.com/maps/@40.7994633,-96.7100588,3a,28.2y,90.27h,92.66t/data=!3m6!1e1!3m4!1sciG3wQRo1tAs6r5-awa7Hg!2e0!7i13312!8i6656!6m1!1e1> (CX 47);

[https://www.google.com/maps/@40.7992229,-96.7096797,3a,47.3y,317.69h,91.81t/data=!3m6!1e1!3m4!1sNPTwqoYzVTzKGaUAiG\\_qAA!2e0!7i13312!8i6656!6m1!1e1](https://www.google.com/maps/@40.7992229,-96.7096797,3a,47.3y,317.69h,91.81t/data=!3m6!1e1!3m4!1sNPTwqoYzVTzKGaUAiG_qAA!2e0!7i13312!8i6656!6m1!1e1) (CX 48); and

<https://www.google.com/maps/@40.799225,96.7100583,3a,90y,90.04h,96.75t/data=!3m6!1e1!3m4!1sQowM2K1C9d4jjOtr115tAw!2e0!7i13312!8i6656!6m1!1e1> (CX 49).

In this case, Complainant is supplying additional evidence that is both relevant and material to issues that must be decided at hearing. Additionally, Complainant is providing this information more than fifteen days prior to the scheduled hearing date of March 22, 2016. Inclusion of these exhibits in the prehearing exchange will not unfairly prejudice Respondent because they consist of images and information that are publicly accessible online or to which Respondent had access as party to an administrative enforcement proceeding. As such, Complainant respectfully requests that this court grant the instant motion to supplement and amend Complainant's Initial Prehearing Exchange with the exhibits and information identified above.

RESPECTFULLY SUBMITTED,  
this 19<sup>th</sup> day of February, 2016,



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