

**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 RESPONSE TO
LHP, LLC’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, 40 C.F.R. § 22.16(b), Complainant, the United States Environmental Protection Agency, Region 7 (“EPA”), hereby respectfully submits this Response to LHP, LLC’s Motion to Supplement Prehearing Exchange, stating as follows:

I. INTRODUCTION

In this response, Complainant makes known its conditional objection to LHP, LLC’s Motion to Supplement Prehearing Exchange with the document identified as “Proposed Group RX14” on the basis of the document’s unascertained reliability and dubious probative value in this case. Additionally, Complainant here clarifies the useful scope of Anita Rockenback’s proposed testimony in this matter, reiterating its argument as to the minimal probative value of the pre-renovation photograph identified as RX1 that Ms. Rockenback may be called to authenticate at trial.

**II. COMPLAINANT'S CONDITIONAL OBJECTION TO
LHP, LLC'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE
WITH PROPOSED GROUP RX14**

Respondent included in LHP, LLC's Motion to Supplement Prehearing Exchange a document identified as "Proposed Group RX14," which was described by Respondent as LHP, LLC's "renovation Note Summary and Checklist that was in its files." Contrary to the Notice of Hearing and Scheduling Order in this matter,¹ Respondent did not contact Complainant to determine whether Complainant opposed its motion with respect to Proposed Group RX14. As such, Complainant was not given the opportunity to review and object to Respondent's motion to supplement with Proposed Group RX14 prior to the document's appearance in Respondent's Motion to Supplement Prehearing Exchange. Complainant therefore utilizes this Response to state the basis of its objection.

Complainant objects to supplementation of Proposed Group RX14 because it has reasonable doubts as to the authenticity, reliability, and probative value of the document at trial. Specifically, Complainant questions whether the record was created by Respondent in the ordinary course of business at or near the time of the events described therein due to the timing of production, phrasing, and general content of Proposed Group RX14.² Furthermore, the content of this document is beyond the scope of renovation recordkeeping required by the Renovation, Repair, and Painting Rule. *See* 40 CFR 745.86(b)(6). Proposed Group RX14 contains, in substantial part, the information required of such recordkeeping (*e.g.*, training,

¹ The Notice of Hearing and Scheduling Order states: "Prior to filing any motion, the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties." The Order on Respondent's Unopposed Motion for Extension of Time in this matter extended certain dates and changed the location of hearing as provided in the Notice of Hearing and Scheduling Order, but otherwise maintained the terms of the Notice of Hearing and Scheduling Order.

warning signs, containment, and cleanup), however it also contains surplus statements *not required* by the regulation.³ For all of these reasons, Complainant questions the authenticity, reliability, and probative value of Proposed Group RX14 and states its objection to LHP, LLC's Motion to Supplement Prehearing Exchange on this ground.

In spite of this objection, however, Complainant believes that Respondent could relieve Complainant of such doubts by providing proper foundation for Proposed Group RX14 in advance of trial. Complainant is, therefore, prepared to lift its objection to Respondent's motion to supplement Proposed Group RX14 if Respondent provides the electronic files in which Proposed Group RX14 was originally written and/or created, including Microsoft Word, Adobe PDF, and/or other word processing file formats. These files should be in native format and include all metadata including, but not limited to, date and time of creation, creator, and any modifications and dates thereto. This information should come from the files of LHP, LLC, or its agents and representatives; David Fiala; and/or Delaney Law, PC, as received from LHP, LLC, or David Fiala. Complainant believes that such foundational information could be collected relatively easily before the scheduled trial and provided via Email and/or flash-drive. Upon Complainant's receipt and satisfactory review of such substantiating documents, Complainant would not oppose Proposed Group RX14 as a supplement to Respondent's Initial Prehearing Exchange.

³ Notably, the document contains statements including: (1) the paragraph entitled "Brief Description of Renovation and Condition before and after"; (2) the statement at the conclusion of the document that reads "We did the right thing and picked up what as [sic] there, and will do the same again in the future"; and (3) the statement "I certify under penalty of law that the above information is true and complete." This information is outside the scope of what is required by regulation and irrelevant.

**III. CLARIFICATION OF COMPLAINANT'S POSITION
ON THE TESTIMONY OF ANITA ROCKENBACK**

In this Response, Complainant also seeks to clarify the limited useful scope of Anita Rockenback's proposed witness testimony. Complainant's position is that the photograph identified as RX1—even if authenticated by the testimony of Ms. Rockenback—is of little or no probative value as to the condition of the subject property prior to renovations by LHP, LLC.

In LHP, LLC's Motion to Supplement Prehearing Exchange, Respondent seeks to add Ms. Rockenback as a potential witness because she "has knowledge as [sic] the status of the house before renovations and Complainant has indicated that it wanted someone who can authenticate the 'Before' picture found in RX1." Respondent correctly reports that Complainant requested authentication of the pre-renovation photograph presented as RX1, and that Complainant has no objection to the addition of Ms. Rockenback for this purpose. However, Respondent's motion is misleading because it does not address the full scope of Complainant's request concerning RX1.

Specifically, Complainant seeks not only authenticating and foundational information with respect to RX1 but a higher-quality version of the photograph itself. As explained in Complainant's Motion to Supplement Prehearing Exchange, Respondent has submitted only low-quality photocopy reproductions of the photograph on which it purports to establish that regulated renovation activities could not have occurred on the property. *See Compl.'s Mot. to Supp. Preh'g Exch.* at 3-4. Respondent first presented the photograph RX1 in Respondent's Initial Prehearing Exchange, stating at paragraph 3 that it is a "[p]icture of the Property from the Listing prior to working [sic] being done on the Property" Respondent's Motion for Summary Judgment then relied on this photograph to argue that "[n]one of the pictures in the report show anyone scraping paint." *Resp.'s Mot. for Summ. Judg.* at 5. "In fact," Respondent

continued, “Mr. Fiala has a picture which shows the relevant portion of the house before the November 9, 2012 inspection; that picture depicts the relevant portion as grey concrete blocks.”

Id. This contention is presumably grounded in David Fiala’s sworn statement in an affidavit accompanying the motion that he “provided a before-picture that showed the area the EPA alleges was being scraped as grey concrete blocks prior to being painted on November 8, 2012.”

Id. at Grp. Exh. A, para. 8.

On the basis of Respondent’s argument, Complainant made repeated requests to Respondent’s counsel for a higher-quality version of the photograph identified as RX1.⁴ As of the date of this filing, and as stated also in Complainant’s Motion to Supplement Prehearing Exchange, Respondent has yet to provide such photographs to Complainant. Complainant’s concerns regarding RX1 may be alleviated, however, by Respondent providing Complainant a higher-quality photograph reasonably in advance of hearing via Email and/or flash-drive.

IV. CONCLUSION

For the reasons stated above, Complainant will not object to Proposed Group RX14 if Respondent produces information that proves the document presented as Proposed Group RX14 was created or produced by David Fiala at or near the time of the EPA’s November 9, 2012, inspection at 800 A Street in Lincoln, Nebraska. Additionally, Complainant maintains that RX1 is itself insufficient evidence to support Respondent’s contentions as to the pre-renovation condition of the home even if authenticated by the testimony of proposed witness Anita Rockenback. Therefore, Complainant requests that Respondent provide foundational information regarding Proposed Group RX14 as well as a higher-quality version of the

⁴ In Complainant’s Motion to Supplement Prehearing Exchange, Complainant noted that it requested Respondent provide a higher-quality version of the photograph by telephone on December 4, 2015, and by Email on January 22, 2016.

photograph identified as RX1 sufficiently in advance of the hearing as to not prejudice

Complainant.

RESPECTFULLY SUBMITTED,
This 25th day of February, 2016



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