UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
GreenBuild Design & Construction, LLC,	)	**Docket No. TSCA-10-2021-0006**
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

This action was initiated on December 2, 2020, when Complainant, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region 10 ("EPA" or "the Agency"), filed a Complaint and Notice of Opportunity for Hearing against Respondent, GreenBuild Design & Construction, LLC.[1] The Complaint alleges that Respondent committed four violations of Subchapter IV of the Toxic Substances Control Act ("TSCA"), codified as amended at 15 U.S.C. §§ 2681 to 2692, and regulations promulgated thereunder.[2]

Respondent filed an Answer to the Complaint on January 27, 2021, denying the violations, raising various defenses, and requesting a hearing.

In response to this Tribunal's Prehearing Order, the Agency filed its initial prehearing exchange and a rebuttal prehearing exchange containing 105 proposed exhibits ("CX") on April 20, 2021 and May 24, 2021, respectively. Respondent submitted a single proposed exhibit ("RX") with a prehearing exchange filed May 17, 2021.

On June 23, 2021, the Agency filed a Motion for Accelerated Decision as to Liability and Memorandum in Support ("Motion").[3] Respondent filed a response in opposition ("Response") on July 23, 2021. On August 6, 2021, the Agency submitted a reply brief ("Reply") in support of the Motion.

For the reasons discussed below, the Motion is **GRANTED**.

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[1] The Agency also filed a Spanish-language version of the Complaint on December 29, 2020.

[2] Subchapter IV was added to TSCA by the Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021, 106 Stat. 3672, 3912–3924.

[3] Citations to Motion page numbers refer to page numbers of the Memorandum in Support.

I. Accelerated Decision Standard

Under the Rules of Practice that govern this proceeding, Administrative Law Judges are authorized to:

> 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). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules do not directly apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decision under Part 22. *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). Federal courts have endorsed this approach, describing Rule 56 as "the prototype for administrative summary judgment procedures" and its associated jurisprudence as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

Under the Federal Rules, summary judgment shall be granted "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). A fact is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In turn, a dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250–52.

The party moving for summary judgment bears the burden of showing an absence of genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This includes an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). A party must support its assertion that a material fact cannot be or is genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . 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). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot

produce admissible evidence to support the fact." *Id.*

Evidentiary material and reasonable inferences drawn therefrom must be construed in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252–55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158–59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion permit denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

In applying these principles to motions for accelerated decision under Section 22.20(a) of the Rules of Practice, the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.* As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. The evidentiary standard that applies here is proof by a preponderance of the evidence. 40 C.F.R. § 22.24(b). The complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

II. Governing Substantive Law

Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992 after finding that low-level lead poisoning was afflicting as many as three million American children under age six and causing "intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems." Pub. L. No. 102-550, § 1002(1)–(2), 106 Stat. 3672, 3897. Through the Act, Congress sought to develop a national strategy "to eliminate lead-based paint hazards in all housing as expeditiously as possible," particularly by targeting homes built before 1980. Pub. L. No. 102-550, §§ 1002(3), 1003(1), 106 Stat. 3672, 3897.

To help carry out this strategy, Subtitle B of the Act amended TSCA by adding Subchapter IV—Lead Exposure Reduction. Pub. L. No. 102-550, § 1021, 106 Stat. 3672, 3912–3924 (codified at 15 U.S.C. §§ 2681 to 2692). Under the TSCA amendments, the Agency is charged with implementing "regulations governing lead-based paint activities to ensure that individuals engaged in such activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified." 15 U.S.C. § 2682(a)(1). These regulations are further required to "contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety," and apply specifically to renovation or remodeling activities in target housing. 15 U.S.C. § 2682(c)(3). TSCA defines "target housing" to include "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)." 15 U.S.C. § 2682(17).

Pursuant to this authority, the Agency promulgated its Lead-Based Paint Renovation, Repair and Painting ("RRP") Rule, codified at 40 C.F.R. pt. 745, subpt. E, "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. 21692, 21693 (April 22, 2008) (Final Rule). With certain exceptions, the RRP Rule "applies to all renovations performed for compensation in target housing and child-occupied facilities[.]" 40 C.F.R. § 745.82(a). A "renovation" is "the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces," including:

> [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)); the removal of building components (e.g., walls, ceilings, plumbing, windows); weatherization projects (e.g., cutting holes in painted surfaces to install blown-in insulation or to gain access to attics, planing thresholds to install weather-stripping), and interim controls that disturb painted surfaces.

40 C.F.R. § 745.83. The term "renovation" does not include "minor repair and maintenance activities," which

> are activities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing, that disrupt 6 square feet or less of painted surface per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed.

40 C.F.R. § 745.83.

The RRP Rule imposes certification requirements on both "firms" and "renovators" who renovate target housing and sets forth various work practice standards with which renovations must comply. *See* 40 C.F.R. §§ 745.85, 745.89, 745.90. A "firm" may include "a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity." 40 C.F.R. § 745.83. A "renovator" is "an individual who either performs or directs workers who perform renovations," and "[a] certified renovator is a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal program." 40 C.F.R. § 745.83.

"Firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling," and "no firm may perform, offer, or claim to perform renovations without certification from EPA . . . in target housing or child-occupied facilities" unless a particular exception applies. 40 C.F.R. §§ 745.81(a)(2)(ii), 745.89(a)(1). When a firm is renovating target housing, the renovation must be directed by a certified renovator and performed by certified renovators or workers trained by a certified renovator. 40 C.F.R. § 745.81(a)(3). Additionally, firms must ensure that all individuals performing renovation activities on the firm's behalf "are either certified renovators or have been trained by a certified renovator" and that "[a] certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities" required by the regulations. 40 C.F.R. § 745.89(d)(1)–(2).

At the worksite, work practice standards require firms to "post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area." 40 C.F.R. § 745.85(a)(1); *see also* 40 C.F.R. § 745.89(d)(3) (mandating that firms adhere to work practice standards in 40 C.F.R. § 745.85). The signs must be posted before the renovation begins and remain in place and readable until after the renovation and post-renovation cleaning verifications is complete. 40 C.F.R. § 745.85(a)(1). These same work standards also provide that "[b]efore beginning the renovation, the firm must isolate the work area so that no dust or debris leaves the work area while the renovation is being performed." 40 C.F.R. § 745.85(a)(2). For exterior renovations, this means that a firm must "[c]over the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect

falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering." 40 C.F.R. § 745.85(a)(2)(ii)(C).

It is unlawful for any person[4] to fail or refuse to comply with a provision of Subchapter IV of TSCA or any regulation issued thereunder. 15 U.S.C. § 2689. Likewise, the RRP Rule provides that failure or refusal to comply with the rule is a violation of 15 U.S.C. § 2689. 40 C.F.R. § 745.87(a). Any person who violates 15 U.S.C. § 2689 is liable to the United States for a civil penalty of up to $41,056 for each violation.[5] 15 U.S.C. § 2615(a)(1); 40 C.F.R. § 19.4.

III. Factual Background

Respondent is GreenBuild Design & Construction, LLC, a limited liability company incorporated in the state of Alaska and engaged in the construction business. Compl. ¶ 3.1; Answer ¶ 3.1; CX 56; CX 75; CX 91. Rodrigo von Marees[6] and Kari von Marees are Respondent's co-owners. CX 75 at 2.

Respondent came to the Agency's attention as early as 2015 through the Agency's routine lead-based paint enforcement activity. CX 5 ¶ 35; CX 83 at 4. In Region 10, Agency inspectors monitor compliance with the RRP Rule through recordkeeping inspections and work site inspections, mostly in Idaho and Alaska where the states do not enforce a federal equivalent to the RRP Rule. CX 4A ¶ 10; CX 5 ¶ 13. One way the Agency finds firms doing renovation work on pre-1978 housing is by reviewing local building permits. CX 4A ¶ 13; CX 5 ¶ 15. If a firm has not been certified to perform renovations in target housing, the Agency typically schedules a recordkeeping inspection at a public location in the firm's local area. CX 4A ¶¶ 14–17; CX 5 ¶¶ 18–21. The Agency may also conduct a site inspection, particularly in cases where the firm has failed to attend previously scheduled recordkeeping inspections or continued to perform renovations without obtaining the necessary certification. CX 4A ¶¶ 19–22; CX 5 ¶ 26.

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[4] "Person" includes "any natural or judicial person including any individual, corporation, partnership, or association." 40 C.F.R. § 745.83.

[5] When enacted, TSCA specified a civil penalty of up to $25,000 per violation. That amount has since been increased under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

[6] Mr. von Marees was previously known as Rodrigo Diaz, a name that appears on some of the documents in the record of this proceeding. CX 5 ¶ 38. *See, e.g.*, CX 80. Respondent contends that one of the Agency's exhibits, a Westlaw Company Investigator Report (CX 78), contains "false and damaging" background information about it or its owners, including one "Rodriguez Alejandro Diaz." Resp. at 3. This Order makes no finding as to the veracity of this claim, nor does it consider or rely on CX 78. Additionally, Respondent charges that the inclusion of CX 78 suggests that false evidence has been "implanted" throughout the record. Resp. at 3. This claim is without merit.

On three occasions between December 2015 and October 2017, the Agency attempted to schedule record keeping inspections with Respondent, but Respondent failed to attend the inspections. CX 5 ¶¶ 35–40; CX 80–CX 84; CX 93. During this time, the Agency identified four building permits issued to Respondent for renovations of homes built prior to 1978 and covered by the RRP Rule. The Agency knew that Respondent was not a certified firm and that Mr. von Marees was not a certified renovator. CX 83; CX 93.

On April 12, 2018, Maria "Socky" Tartaglia, an Enforcement Protection Specialist and TSCA Lead Based Paint Enforcement and Compliance Officer in the Agency's Region 10 office, spoke on the phone with Mr. von Marees about TSCA and the RRP Rule requirements. CX 6 ¶ 8. She informed him that to work on pre-1978 homes, "Respondent must be EPA firm certified and EPA renovator certified." CX 6 ¶ 9. Mr. von Marees responded "that he understood the RRP Rule requirements and that he would no longer work on pre-1978 homes." CX 6 ¶ 10. On April 25, 2018, Ms. Tartaglia sent Respondent a letter by certified mail restating the RRP Rule requirements as they applied to Respondent, setting forth the potential penalties for noncompliance, and providing resources to obtain the necessary certifications. CX 6 ¶¶ 11–13; CX 85.

Around June 13, 2018, Respondent entered into a contract to complete renovation work at a residential dwelling located at 2208 Turnagain Parkway, Anchorage, Alaska ("the Turnagain Property"). CX 7 at 5; CX 8;[7] CX 10; CX 61. The Turnagain Property was built in 1953, and prior to Respondent's involvement, the structure was a two-bedroom, two-bathroom single family home with 1,584 square feet of living space. Compl. ¶ 3.4; Answer ¶ 3.4; CX 62; CX 63 at 2; CX 86 at 1. A January 2018 real estate listing shows the home at that time with a large picture window in the living room and an exterior painted red. CX 65 at 1–3, 7. In an interior photograph, the kitchen has yellow wallpaper and wood cabinets. CX 65 at 4. There are wood panels on walls in the living room, as well as a brick fireplace and wood floors. CX 65 at 5–6.

For the renovation of the Turnagain Property, Respondent obtained building permit no. R18-1823, which authorized drywall, electrical, and plumbing work, as well as roof repairs. Compl. ¶¶ 3.3, 3.6; Answer ¶¶ 3.3, 3.6; CX 7 at 5; CX 10; CX 68–CX 72. Respondent acted as the general contractor for the owner of the Turnagain Property and hired subcontractors for painting, plumbing, roofing, and electrical work. CX 7 at 5; CX 59; CX 60. The Turnagain Property owner agreed to pay Respondent $127,000, and Respondent ultimately invoiced the owner for a "complete house remodeling" that totaled $128,580. CX 8 at 8–9; CX 9.

Rob Hamlet, an Environmental Specialist/SEE Program[8] employee in the Air and Toxics Enforcement Section of the Air and Land Enforcement Branch in Region 10, discovered the

[7] The version of the contract in the record is unsigned. CX 8 at 7. However, its authenticity has not been questioned.

[8] The SEE Program is EPA's Senior Environmental Employment Program, which through grants and cooperative agreements with national aging organizations places "retired and unemployed Americans age 55 and over" in various clerical, technical, and professional positions at the Agency. *See* https://www.epa.gov/careers/senior-environmental-employment-see-program.

Turnagain Property renovation while reviewing Anchorage building permits. CX 5 ¶¶ 3, 41. Mr. Hamlet was familiar with Respondent from the Agency's previous inspection attempts. CX 5 ¶¶ 35–40. On July 2, 2018, Mr. Hamlet sent Respondent a notice of inspection scheduled for July 26, 2018. CX 2 ¶ 15; CX 5 ¶¶ 42, 44; CX 92. After not hearing from Respondent for a week or two, Mr. Hamlet called and spoke on the phone with Mr. von Marees, who agreed to attend the inspection. CX 5 ¶¶ 43–44.

Not long thereafter, Mr. Hamlet flew to Anchorage with Kim Farnham, an Environmental Protection Specialist and Lead-Based Paint Compliance Officer in Region 10, to conduct several inspections, including one of Respondent. CX 4A ¶¶ 1–3, 55–56; CX 5 ¶ 46. On July 25, 2018, they called Mr. von Marees to confirm he would attend the inspection scheduled for the next day. Mr. von Marees said he could not attend because a conflict had arisen with the scheduled time. CX 5 ¶ 47. Mr. Hamlet and Ms. Farnham rescheduled the inspection for July 27, 2018, but suspecting Respondent would not appear then either, they decided to conduct an unannounced active worksite inspection at the Turnagain Property. CX 4A ¶¶ 59, 61–62; CX 5 ¶¶ 47–49; CX 6 ¶¶ 17–19; CX 7.

Mr. Hamlet and Ms. Farnham arrived at the Turnagain Property shortly before noon on July 25, 2018. CX 7 at 1, 3; CX 89. Several people were at the property and working on the house. Mr. and Mrs. von Marees were also there. CX 4A ¶ 66, 68; CX 5 ¶ 52–53. While Mr. Hamlet walked around the property and took photographs, Ms. Farnham interviewed Mr. von Marees.[9] CX 4A ¶¶ 68–73; CX 5 ¶ 56; CX 7 at 3. Mr. von Marees signed the Agency's Notice of Inspection, and in response to Ms. Farnham's questions, stated that Respondent was not a certified firm under the RRP Rule and that he was not a certified renovator. CX 4A ¶¶ 69–70, 78–79; CX 7 at 3–4. Ms. Farnham informed him that the RRP Rule requires firms to be certified to renovate target housing and explained how he could obtain that certification. CX 4A ¶¶ 80–81; CX 5 ¶ 67; CX 7 at 3–4. In describing the renovation, Mr. von Marees stated that Respondent began work on the Turnagain Property about two weeks earlier. The property was vacant during that time. He said that although Respondent had replaced the siding on the house, the new siding was placed over the old siding, so no paint was disturbed. He also asserted the interior of the house contained unpainted wood paneling throughout, so no paint was disturbed during its removal. Additionally, Mr. von Marees claimed the upstairs ceiling drywall had been tested for lead paint prior to being demolished, and the test returned a negative result. However, he could not produce any documentation of the test or its results. CX 7 at 5; CX 94.

While standing near the tailgate of Mr. von Marees's truck, Ms. Farnham saw workers power washing the side and back of the house, paint chips on the ground near the house, no visible warning signs notifying people not involved in the renovation to stay away, and no plastic

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According to his resume, Mr. Hamlet is a Geologist/Hydrogeologist licensed by the state of Washington who, prior to joining the Agency in 2017, had more than 20 years of experience as an environmental geologist in project management, field management, and client management capacities. CX 2. During his time at the Agency, he has obtained several lead-based paint inspection certifications. CX 2.

[9] Ms. von Marees left immediately after the inspectors arrived. CX 5 ¶ 53.

sheeting on the ground around the house. CX 4A ¶¶ 73–77; CX 7 at 6; CX 94 at 3. Likewise, while Ms. Farnham and Mr. von Marees were speaking, Mr. Hamlet made several observations as he walked around the house and took pictures:

> The work site was a general mess, in the sense that there was no containment being used, there was no plastic sheeting on the ground, there were no warning signs around the perimeter to warn people about the danger of lead-based paint, and paint chips were flying everywhere. There were paint chips all over the bare ground.
>
> At the north side and northwest corner of the house, I observed workers pressure washing new siding and existing eaves and overhangs on the roof. This was causing paint chips to become airborne and land on the ground.
>
> It appeared that the workers had pressured washed all the eaves and overhangs on the roof around the house.
>
> None of the workers I observed were wearing personal protective equipment.
>
> I walked around the back of the house, and there was construction debris in the yard without any plastic sheeting under it or other form of containment being used. The construction debris appeared to be wood, roofing material, and other material pulled from the house.
>
> I could see into the interior of the home from the outside. Lots of work had been done on the interior. Bare 2x4 studs were visible inside. The windows looked new, based on how they looked and the age of the house. Mr. von Marees verbally confirmed that the windows were new.

CX 5 ¶¶ 58–59, 61–65. *See also* CX 7 (inspection report with selected photos and descriptions); CX 26–CX 31, CX 34, CX 42, CX 53 (photos of pressure washing around workers with no containment being used or signs posted warning of active renovation work); CX 35–CX 36, CX 39–CX 40, CX 46 (photos of visible paint chips on bare ground close to foundation of house with no containment being used); CX 38, CX 51 (photos showing bare 2x4 studs on the interior of the house); CX 43–CX 45, CX 47–CX 48, CX 50, CX 55 (photos showing trimming prepped for painting with paint scraped off). Before ending the inspection, Ms. Farnham again explained the requirements of the RRP Rule to Mr. von Marees and told him how Respondent could become certified. CX 4A ¶¶ 80–81; CX 5 ¶ 67. She also "told him [she] would return to the office and refer the case to a case developer." CX 4A ¶ 82; *see also* CX 5 ¶ 68 ("At the end of the inspection, [Ms. Farnham] explained the next steps to Mr. von Marees. She said she would put together the inspection report detailing what we observed and that it would be referred to management for review.").

More than two weeks after the inspection, Respondent obtained firm certification on August 10, 2018.[10] CX 11; CX 13. On September 6, 2018, Mr. von Marees informed the Agency he had registered for the RRP Renovator initial class scheduled for October 16, 2018.[11] CX 7 at 11.

The renovated Turnagain Property was sold on November 16, 2018. A real estate listing described it as a three-bedroom home with two full bathrooms and one partial bathroom. The listing further described the property as containing brand new electrical wiring, all new plumbing lines, plus a "[n]ew boiler, roof, windows, and tiled baths." CX 63. The Turnagain Property sold again in August 2020. An online listing from the sale states that "[t]his Turnagain classic was re-built in 2018. All new electric, plumbing, heating, roof, and every surface imaginable . . . and new exterior too." CX 66 at 1–2; CX 79. Photographs show the exterior of the house has been painted blue, the old windows replaced with new larger windows, and a front porch has been added. CX 66 at 3–5. Photographs of the living room reveal that recessed lights were installed in the ceiling and the fireplace has been removed. *Compare* CX 66 at 5–6 *with* CX 64 at 7, 10. Photographs of the kitchen demonstrate that it was completely remodeled, with new cabinets, counters, appliances, and a new window. CX 66 at 7–9; CX 64 at 10. Bedrooms, bathrooms, and the basement also appear to have been remodeled. CX 66 at 10–15.

IV. Discussion of Liability

The Complaint alleges Respondent committed four different violations of the RRP Rule while working on the Turnagain Property. Compl. ¶¶ 4.1–4.32. The first issue that must be addressed is whether Respondent's work on the Turnagain Property was subject to the RRP Rule. Respondent's liability for each specific violation is assessed thereafter.

a. The RRP Rule applies to Respondent's work on the Turnagain Property

In general, the RRP Rule "applies to all renovations performed for compensation in target housing . . . ." 40 C.F.R. § 745.82(a). As stated above, a "renovation" includes "the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces." 40 C.F.R. § 745.83. A "painted surface" is "a component surface covered in whole or in part with paint or other surface coatings." 40 C.F.R. § 745.83. A "component or building component" are "specific design or structural elements or fixtures of a building or residential dwelling that are distinguished from each other by form, function, and location." 40 C.F.R. § 745.83. Inside of a house, this may include "ceilings, crown molding, walls, chair rails, doors, door trim, floors, fireplaces, radiators and other heating units, shelves, shelf supports, stair treads, stair risers, stair stringers, newel posts, railing caps, balustrades, windows and trim . . .

[10] Before becoming certified, Respondent on July 30, 2018, obtained a building permit to renovate a five-bedroom home at 4220 Tahoe Drive, target housing subject to the RRP Rule because it was built in 1969. CX 87; CX 88.

[11] On December 28, 2018, Mr. von Marees told the Agency he had sent it a copy of his renovator certification after he had completed the class. CX 7 at 11; CX 12.

built in cabinets, columns, beams, bathroom vanities, counter tops, and air conditioners." 40 C.F.R. § 745.83. On the home's exterior, this may include "[p]ainted roofing, chimneys, flashing, gutters and downspouts, ceilings, soffits, fascias, rake boards, cornerboards, bulkheads, doors and door trim, fences, floors, joists, lattice work, railings and railing caps, siding, handrails, stair risers and treads, stair stringers, columns, balustrades, windowsills or stools and troughs, casings, sashes and wells, and air conditioners." 40 C.F.R. § 745.83. Here, in addition to the fact that Respondent billed the Turnagain Property owner $128,580 for a "complete house remodeling," there is ample evidence in the record that Respondent's work constituted a "renovation" because it involved the modification of existing structures that resulted in the disturbance of painted surfaces. CX 8 at 8–9; CX 9.

i. Respondent modified the interior and exterior of the Turnagain Property in ways that disturbed painted surfaces

Inside of the home, Respondent completed the "[d]emo [of] all interior and open walls removing wood panels, drywall, insulation, electrical & plumbing." CX 9 at 1. Ms. Farnham and Mr. Hamlet observed the extent of this remodeling during their inspection when they witnessed Respondent actively working on the property. Mr. Hamlet could

> see into the interior of the home from the outside. Lots of work had been done on the interior. Bare 2x4 studs were visible inside. The windows looked new, based on how they looked and the age of the house. Mr. von Marees verbally confirmed that the windows were new.

CX 5 ¶¶ 63–65. Mr. Hamlet also took pictures that show bare 2x4 studs on the interior of the house without ceiling or walls. *See* CX 38; CX 51. Additionally, photographs from real estate listings present the Turnagain Property before and after Respondent's work there, and it is evident that modifications made to the structure disturbed painted surfaces. Specifically, the painted surfaces of the living room wall and ceiling were replaced and recessed lights were installed. *Compare* CX 64 at 7 and CX 65 at 6 *with* CX 38, CX 51, and CX 64 at 6, 8–9; CX 8 at 10. Similarly, painted and wall-papered surfaces in the kitchen were removed and replaced. *Compare* CX 64 at 10 *with* CX 64 at 11–13; CX 8 at 10, 13, 14. As the Agency recognizes, Respondent has also admitted to the presence of painted surfaces in the home by claiming to have tested the "upstairs ceiling drywall" for lead. *See* Mot. at 19; CX 7 at 5; RX 1. Based on all this work, it is evident that Respondent modified existing structures, or portions of those structures, in ways that disturbed painted surfaces inside the house.

Outside of the house, Respondent replaced doors and windows, painted the exterior, installed "new style siding like shaker cedar shingles," and built a new front porch entryway. CX 9 at 1; CX 61. All of this resulted in the disturbance of painted surfaces. *Compare* CX 64 at 3, 5 and CX 65 at 1–3 *with* CX 61 and CX 64 at 4 (showing front and sides of house with red-painted siding prior to renovation and blue-painted siding with cedar shingles after renovation). Additionally, during the inspection, Ms. Farnham and Mr. Hamlet watched workers power washing the sides and back of the house. CX 4A ¶¶ 73–77; CX 7 at 6; CX 94 at 3. According to Mr. Hamlet, the workers were "pressure washing new siding and *existing* eaves and overhangs

on the roof" at the north side and northwest corner of the house, "causing paint chips to become airborne and land on the ground." CX 5 ¶ 59 (emphasis added). He noted "[i]t appeared that the workers had pressure washed all the eaves and overhangs on the roof around the house." CX 5 ¶ 60. Mr. Hamlet's photographs confirm his description. *See* CX 7 at 7–10 (inspection report with selected photos and descriptions); CX 22 (worker pressure washing existing eaves and overhang of roof); CX 55 (existing siding of house and roof overhang with painted surface scraped away); CX 35–CX 36, CX 39–CX 40, CX 46 (photos of paint chips on ground). Pressure washing can strip paint from surfaces and therefore is a "renovation activity" to the extent that it involves "[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))." *See* 40 C.F.R. § 745.83. In this case, Mr. Hamlet directly witnessed the disturbance of painted surfaces on the existing eaves and roof overhangs of the Turnagain Property, because he saw that the pressure washing was "causing paint chips to become airborne and land on the ground." CX 5 ¶ 59.

ii. Respondent's renovation of the Turnagain Property was performed for compensation in target housing

For the renovation work discussed above, Respondent sent the owner of the Turnagain Property an invoice for $128,580. The invoice indicates that, at the time it was created, Respondent had already been paid nearly $115,000. CX 9; *see also* Answer ¶ 3.7 (Respondent's admission that it presented the invoice to the Turnagain Property owners). This is undisputed evidence that Respondent renovated the Turnagain Property for compensation. Finally, because the Turnagain Property was a two-bedroom house constructed in 1953, it is "target housing" as defined by TSCA. 15 U.S.C. § 2682(17); Compl. ¶ 3.4; Answer ¶ 3.4; CX 62; CX 63 at 2; CX 86 at 1.

iii. Respondent's work was not "minor repair and maintenance activities"

Respondent has hinted that its work was not a "renovation" either because it was "minor repair and maintenance activities" that are exempt from the RRP Rule as defined in 40 C.F.R. § 745.83 or because the work did not affect regulated materials. First, in its Answer, Respondent denies that its work disrupted more than six square feet of painted surface inside the home, because "the surface in question was wood paneling and not a painted surface." Answer ¶ 3.8. Mr. von Marees made the same assertion during the inspection interview. CX 7 at 5. Similarly, Respondent admits in its Answer to pressure washing siding on the exterior of the house but denies there were any violations of the RRP Rule, because the siding was new and had been placed directly on top of the existing siding. Answer ¶¶ 3.13, 4.29. But Respondent did not make any of these arguments in response to the Agency's Motion, and it has not submitted evidence or cited any materials in the record to support the denials in its Answer. Because Respondent cannot "meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence," these denials do not raise genuine factual disputes. *See BWX*, 9 E.A.D. at 75; Fed. R. Civ. P. 56(c)(1). Accordingly, Respondent's Answer does not create a genuine dispute that its work did not qualify as a "renovation."

But even if further consideration is given to Respondent's denials, they are controverted by the evidence. With respect to the interior work, photographs in the record show that although some of the Turnagain Property's walls were wood paneled, other surfaces were painted drywall. For example, a picture of the living room prior to the renovation shows part of a white painted wall in addition to a painted ceiling and wood paneled wall. *See* CX 65 at 6. Even without the availability of actual measurements, it is evident based on the visible height and width of the wall that there is more than six square feet of painted surface. As the Agency observes, the wall is clearly more than five feet high, meaning it could be only 1.2 feet wide if there were six square feet or less of surface area. Mot. at 23. Enough of the wall can be seen in the photograph to conclude that it is wider than 1.2 feet and that Respondent disturbed more than six square feet of painted surface.[12]

On the exterior of the house, the evidence demonstrates that only the front and sides had new siding. *See* CX 8 at 13 (Respondent agreed to "[r]eplace front, north and south side exterior walls of home with new Cedar Shake shingles"). Siding that preexisted Respondent's work was still attached to the back of the structure, and Mr. Hamlet witnessed workers pressure washing the back of the house. CX 42 (worker pressure washing back of house); CX 54 (inspection photograph of the Turnagain Property's existing red siding with paint partially removed); CX 55 (inspection photograph of existing red siding and paint removed from eaves and roof overhang); CX 64 at 3–4 (photographs of house before and after renovation showing old and new siding). But even if it were true that Respondent pressure washed only new siding that had been placed on top of existing siding, that does not diminish the fact that Respondent would have disturbed the painted surface of the existing siding in the process of installing new siding. *See* CX 8 at 13 (Respondent agreeing to replace old siding and to "[p]rep, pressure wash, and paint exterior," "[r]eplace any other damaged siding and trim as needed," "[r]epair and replace any fascia as needed," and "[r]epair and replace any damaged framing"). Likewise, it does not change the fact that Respondent also pressure washed existing eaves.

Additionally, the Agency inspectors discovered that the exterior work included the replacement of windows. CX 5 ¶¶ 63–65 (Mr. Hamlet observing that the windows appeared to be new and Mr. von Marees confirming to him that new windows had been installed); CX 8 at 12 (Respondent's agreement to supply and install "new vinyl windows throughout"); CX 9 (Respondent's invoice for "[d]oors and windows package plus installation"); CX 64 at 3 (photograph including picture of old living room window); CX 64 at 4 (photograph including picture of new living room window). This negates the possibility that Respondent's work outside the house could be "minor repair and maintenance activities," because "renovation" includes "the removal of building components (e.g., walls, ceilings, plumbing, windows)" while the "minor repair" exception applies only to work that "does not involve window replacement." 40 C.F.R. § 745.83.

[12] Respondent appears to have demolished or moved the wall to open a staircase to a lower level. *Compare* CX 65 at 6 *with* CX 64 at 9.

iv. Respondent's purported lead test does not exempt the Turnagain Property renovation from the RRP Rule, and there is no evidence the property was "already demoed"

Respondent also denies that it was required to become certified under the RRP Rule before renovating the Turnagain Property, because "the lead test performed was negative." Answer ¶ 4.5. Respondent submitted with its prehearing exchange a self-described "[p]hoto of the Lead sample test taken prior to work completed on [the Turnagain Property]. The photo shows a negative result for lead." Resp't's Initial Prehearing Exchange at 1-2; *see also* RX 1. The exhibit consists of two photos: One shows a 3M Lead Check Swabs Test Confirmation Card with four red-stained circles. The second photo shows what appears to be the back of the card with preprinted directions and handwriting that reads, "Turnagain Project 5/18." RX 1. Respondent does not specifically mention RX 1 in its Response, although it argues that "[a] lead test was performed resulting in [a] negative test result." Resp. at 1.

In citing a negative lead test, Respondent seems to invoke an exception to the application of the RRP Rule. Specifically, the Rule does not apply to

> [r]enovations 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 . . . .

40 C.F.R. § 745.82(a)(2). However, Respondent cannot avail itself of this exception. In plain and unambiguous terms, the exception applies only to tests performed by "a *certified* renovator." 40 C.F.R. § 745.82(a)(2) (emphasis added). There is no question that neither Respondent nor Mr. von Marees were certified renovators at the time Respondent began work on the Turnagain Property. Indeed, Respondent did not become certified until August 10, 2018, well after the Agency's inspection, and it is unclear exactly when or if after the inspection Mr. von Marees finished the individual certification process. *See* CX 11–CX 13. Further, Respondent has offered no evidence to show that "each component affected by the renovation" was tested or that the kit manufacturer's instructions were followed. First, assuming the four red stained circles were made by four different test swabs, that is still an insufficient number of swabs to test *each* of the painted surfaces of the walls, ceilings, windows, and eaves affected by the renovation. Second, as the Agency argues, the card photographed in RX 1 is not a lead test result at all but rather a confirmation test card used to determine whether the active reagent in the lead test is working properly. *See* Mot. at 29–30. The 3M Lead Check Swabs Instruction Manual contains a diagram identical to the test confirmation card in RX 1 and states that it should be used to confirm a negative result: "Included with the 3M™ LeadCheck™ Swabs test kit is a test confirmation card. **On each card are dots containing a small amount of lead.** The test confirmation card is a quality assurance measure to confirm the reactivity of the 3M™ LeadCheck™ reagents when the test result is negative." CX 105 at 2. To that end, RX 1 is evidence that a corresponding LeadCheck swab was working correctly, but it does not itself demonstrate whether lead was detected. Further, Respondent's description of RX 1 as a "Lead

sample test . . . [that] shows a negative result for lead" suggests Respondent was "not following the kit manufacturer's instructions" as required by the regulation or that it did not use the test correctly in the first place. In short, Respondent's bare photograph of a lead test confirmation card has not created a genuine factual dispute as to whether the Turnagain Property's painted surfaces were free from lead.

Respondent makes an additional passing argument that at the time of the renovation, the Turnagain Property "was unoccupied and already demoed." Resp. at 1; *see also* Answer ¶ 4.24. But whether the house was occupied is irrelevant. The RRP Rule "applies to *all* renovations" and does not address occupancy status. 40 C.F.R. § 745.82(a) (emphasis added). Further, Respondent's contract with the owner of the Turnagain Property, its invoice to the owner of the Turnagain Property, and the building permit it obtained all offer ample evidence that Respondent performed the demolition portion of the renovation prior to the work Ms. Farnham and Mr. Hamlet assessed during their inspection. *See* CX 8 at 9 (contract payment schedule providing for payment "[a]fter completion of [e]xterior demo and exterior components"); CX 8 at 10 (specifics of home floorplan/design layout stating that "[o]wner will provide [c]ontractor with final design for home after demo is completed"); CX 8 at 11 (contract term stating that "[c]ontractor will demo existing duct work through home"); CX 8 at 14 (contract term directing that ["f]ireplace, surround, chimney and all related items in living room, garage, and roof will be demolished and removed"); CX 9 at 1 (invoice for "[c]omplete house remodeling" including "[d]emo all interior and open walls removing wood panels, drywall, insulation, electrical & plumbing"); CX 10 (building permit describing work to include "drywall, elec, plum, also repair roof"). In contrast, Respondent offers no evidentiary support for its claim that the house was "already demoed"—or that it did not complete the work that it agreed to in the contract, for which it billed the property owner, and for which it sought a building permit. Therefore, it is not genuinely disputed that Respondent carried out the demolition work at the Turnagain Property.

For the reasons set forth above, the facts are undisputed: Respondent performed a renovation for compensation in target housing at the Turnagain Property, and there is no evidence that Respondent was not required to comply with the RRP Rule.

b. Respondent failed to comply with the RRP Rule while renovating the Turnagain Property, violating TSCA

In its Motion, the Agency argues there are no genuine disputes of material fact with respect to Respondent's liability for the four RRP Rule violations outlined in the Complaint, including that Respondent failed to (1) obtain EPA certification; (2) ensure employees were certified renovators or trained by certified renovators; (3) post warning signs at the worksite; and (4) cover the ground with impermeable material. Mot. at 32–42; Compl. ¶¶ 4.1–4.32. Respondent has generally denied "refusing to understand or follow" the RRP Rule. Resp. at 1.

i. Count 1

The Complaint alleges that Respondent offered to perform, and actively performed, a renovation at Turnagain Property without obtaining firm certification from EPA under 40 C.F.R. § 745.89(a)(1), a violation of § 745.81(a)(2)(ii). Compl. ¶¶ 4.1–4.6. Specifically, the Agency

accuses Respondent of offering to perform a renovation when it obtained a building permit for the Turnagain Property and invoiced the owners for renovation activities. Compl. ¶ 4.3. Even though Respondent was not certified by EPA, Respondent then actively engaged in the renovation, the Agency charges, as evident from the July 25, 2018 inspection. Compl. ¶¶ 4.4–4.5.

In its Motion, the Agency contends that the prima facie elements of the violation alleged in Count 1 have been met: that Respondent is a firm; that Respondent offered to perform, and then performed, a renovation at the Turnagain Property; that the Turnagain Property is target housing; and that Respondent was not certified by EPA until after it performed the renovation. Mot. at 33–36. In response, Respondent broadly contends it did not violate any rules or regulations, but it does not dispute that it lacked firm certification at the time it renovated the Turnagain Property. Resp. at 1–4.

The RRP Rule states that "[f]irms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling." 40 C.F.R. § 745.89(a)(1). This requires that they submit to the Agency an "Application for Firms" and pay the correct amount of fees. *Id.* The Agency "will approve a firm's application if EPA determines that it is complete and that the environmental compliance history of the firm, its principals, or its key employees does not show an unwillingness or inability to maintain compliance with environmental statutes or regulations." 40 C.F.R. § 745.89(a)(2)(i). Under the RRP Rule, "no firm may perform, offer, or claim to perform renovations without certification from EPA under § 745.89 in target housing . . ." unless a particular exception applies. 40 C.F.R. § 745.81(a)(2)(ii).

The undisputed facts set forth above establish that Respondent is a firm, Respondent offered to perform and performed a renovation at the Turnagain Property for compensation, the Turnagain Property is target housing, and Respondent was not certified under 40 C.F.R. § 745.89(a)(1) at the time of the renovation. Specifically, the RRP Rule defines "firm" to include a company or corporation, and Respondent is a limited liability company incorporated in the state of Alaska. 40 C.F.R. § 745.83; Compl. ¶ 3.1; Answer ¶ 3.1; CX 75; CX 91. Respondent offered to perform and then performed a renovation when it executed an agreement with the owner of the Turnagain Property promising to renovate the house, obtained a building permit for that purpose, and then actually completed the work in exchange for compensation. The Turnagain Property is target housing for TSCA purposes because it has multiple bedrooms and was built in 1953. 15 U.S.C. § 2682(17); CX 86. But Respondent was not certified by the Agency under 40 C.F.R. § 745.89 when it renovated the Turnagain Property, and it did not become certified until August 10, 2018, after the Agency's worksite inspection. CX 4A ¶¶ 69–70, 78–79; CX 7 at 3–4; CX 11; CX 13. Other than the arguments already discussed and rejected, Respondent has not submitted or cited to any evidence to dispute these facts.

Accordingly, the undisputed material facts show that Respondent offered to perform, and then performed, a renovation at Turnagain Property without being certified under 40 C.F.R. § 745.89(a)(1). This violated 40 C.F.R. § 745.81(a)(2)(ii), and it is appropriate to grant accelerated decision to the Agency as to Respondent's liability for this violation.

ii. Count 2

The Complaint alleges that during the renovation of the Turnagain Property, Respondent failed to ensure that work was directed by a certified renovator and performed by either a certified renovator or by individuals who had been trained by a certified renovator, in violation of 40 C.F.R. §§ 745.81(a)(3) and 745.89(d)(1)–(2). Compl. ¶¶ 4.7–4.19. Specifically, the Agency declares that when it inspected the Turnagain Property worksite on July 25, 2018, Respondent was engaged in renovation activities even though Mr. von Marees admitted he was not a certified renovator and could not provide documentation to show Respondent's workers had been trained by a certified renovator. Compl. ¶¶ 4.12–4.16.

In its Motion, the Agency argues that Mr. von Marees supervised the Turnagain Property renovation despite the fact that he was not a certified renovator and could not show that Respondent's employees had been properly trained by a certified renovator. Mot. at 37. Respondent does not dispute Mr. von Marees's or its employees' certification status, and it seems to acknowledge that Mr. von Marees had not "completed the required classes for an EPA certification of Lead-based paint renovation" at the time of the inspection. Resp. at 2. Respondent also argues Ms. Farnham said that no penalty would be assessed if Mr. von Marees became certified and provided proof of certification, a condition with which Respondent contends he complied. Resp. at 2; Answer ¶ 4.15.

Under the RRP Rule, all renovations must be directed by individuals who are certified renovators and performed by either certified renovators or people who have been trained by certified renovators. 40 C.F.R. § 745.81(a)(3). Specifically, "[f]irms performing renovations must ensure that: (1) [a]ll individuals performing renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator" and that "(2) [a] certified renovator is assigned to each renovation performed by the firm and discharges all of the certified renovator responsibilities identified in § 745.90." 40 C.F.R. § 745.89(d)(1)–(2).

As established above, Respondent is a firm that performed a renovation at the Turnagain Property. Respondent had one full time employee and otherwise hired subcontractors for painting, plumbing, roofing, and electrical work. CX 7 at 5. Ms. Farnham's statement and the Agency's inspection report demonstrate that during the worksite inspection, Mr. von Marees confirmed to Ms. Farnham that Respondent was not a certified firm under the RRP Rule and that he was not a certified renovator. *See* CX 4A ¶¶ 69–70, 78–79; CX 7 at 3–4. Further, in subsequent emails to Ms. Farnham, Mr. von Marees advised that he had signed up for a renovator certification class scheduled for October 16, 2018, and a couple of weeks later he claimed to have completed the class and become a certified renovator. CX 12. Respondent has denied in its Answer that Ms. Farnham or Mr. Hamlet asked if it or any employees were certified. Answer ¶¶ 4.13–4.14. But Respondent has not pointed to any evidence to support its denial, nor has it raised this argument in its Response.[13] Thus, Respondent has not shown these facts to be in genuine dispute. Further, Respondent has not provided any evidence that any of its

[13] Indeed, Respondent implies Mr. von Marees was not a certified renovator when it contends that after the inspection Mr. von Marees "completed the required classes for an EPA certification of Lead-based paint renovation." Resp. at 2.

employees were certified renovators at the time it was working on the Turnagain Property. Finally, Respondent has not submitted any documents, affidavits, declarations, or other evidence that Ms. Farnham said that no penalty would be imposed if Mr. von Marees became a certified renovator. Conversely, statements from Ms. Farnham and Mr. Hamlet suggest she simply "told him [she] would return to the office and refer the case to a case developer." CX 4A ¶ 82; *see also* CX 5 ¶ 68 ("At the end of the inspection, [Ms. Farnham] explained the next steps to Mr. von Marees. She said she would put together the inspection report detailing what we observed and that it would be referred to management for review."). But even if Respondent's claim were true, it is immaterial to whether Respondent in fact violated the RRP Rule as alleged in the Complaint. A "warning" would not undo Respondent's liability or preclude the initiation of this proceeding.

Accordingly, the undisputed material facts show that Respondent failed to ensure that work at the Turnagain Property was directed by a certified renovator and performed by either a certified renovator or by individuals who had been trained by a certified renovator. This violated 40 C.F.R. §§ 745.81(a)(3) and 745.89(d)(1)–(2), and it is appropriate to grant accelerated decision to the Agency as to Respondent's liability for this violation.

iii. Count 3

The Complaint alleges that during the renovation of the Turnagain Property, Respondent failed to post warning signs in accordance with the work practice standards of 40 C.F.R. § 745.85, a violation of 40 C.F.R. § 745.89(d)(3). Compl. ¶¶ 4.20–4.24. In particular, the Complaint states that during the inspection, "there were no posted signs defining the work area or warning persons to remain outside of the work area." Compl. ¶ 4.23.

In its Motion, the Agency points out that both Ms. Farnham and Mr. Hamlet observed during the inspection that there were no signs posted at the Turnagain Property defining the work area or warning people to stay away. Mot. at 39. The Agency further states that Mr. Hamlet's photographs of the worksite support their assertions. Mot. at 39. Respondent did not address in its Response the lack of appropriate signage.

Under the RRP Rule, "[f]irms performing renovations must ensure that . . . [a]ll renovations performed by the firm are performed in accordance with the work practice standards in § 745.85." 40 C.F.R. § 745.89(d)(3). The work practice standards of § 745.85 further provide that:

> Firms must post signs clearly defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area. To the extent practicable, these signs must be in the primary language of the occupants. These signs must be posted before beginning the renovation and must remain in place and readable until the renovation and the post-renovation cleaning verification have been completed.

40 C.F.R. § 745.85(a)(1).

During the inspection of Respondent's Turnagain Property renovation, Ms. Farnham observed that there were no visible warning signs notifying people not involved in the work to stay away. CX 4A ¶¶ 73, 76; CX 7 at 6; CX 94 at 3. Likewise, while he was walking around the house taking photographs, Mr. Hamlet could see that "there were no warning signs around the perimeter to warn people about the danger of lead-based paint." CX 5 ¶ 58. Mr. Hamlet's photographs substantiate his and Ms. Farnham's declarations. *See* CX 7 at 7–10 (inspection report with selected photos and descriptions); CX 26–CX 31, CX 34, CX 42, CX 53 (photos of workers pressure washing with no signs posted warning of active renovation work). In its Answer, Respondent generally denies the Agency's allegations, claiming that "safety precautions were in place." Answer ¶ 4.23. But Respondent has submitted no argument or evidence to support or explain this denial, let alone to suggest that any signs were posted at the worksite. Respondent has therefore not shown there to be any genuine dispute that it did not post signs warning people to stay out of the work area.

Accordingly, the undisputed material facts show that Respondent failed to post warning signs in accordance with the work standards outlined in 40 C.F.R. § 745.85. This violated 40 C.F.R. § 745.89(d)(3), and it is appropriate to grant accelerated decision to the Agency as to Respondent's liability for this violation.

iv. Count 4

The Complaint alleges that during the renovation of the Turnagain Property, Respondent failed to cover the ground with impermeable material in accordance with the work practice standards of 40 C.F.R. § 745.85, a violation of 40 C.F.R. § 745.89(d)(3). Compl. ¶¶ 4.25–4.32. Specifically, the Complaint claims that during the Turnagain Property inspection, Respondent's workers were pressure washing the exterior of the house but "there was no plastic sheeting or other disposable impermeable material covering the ground . . . ." Compl. ¶¶ 4.29–4.30. Further, the Complaint alleges, "there was no containment area that isolated the work area so that no dust or debris would be able to leave the work area while the renovation was being performed." Compl. ¶ 4.31.

In its Motion, the Agency argues that Ms. Farnham and Mr. Hamlet both noted during their inspection that Respondent had not isolated the work area to prevent dust or debris from spreading and that it had not put down plastic sheeting or other disposable impermeable material to cover the ground. Mot. at 41. As a consequence, the Agency maintains, paint chips were "strewn on the bare ground throughout the work area." Mot. at 41. Respondent does not directly address the lack of plastic sheeting or impermeable material, but it challenges Mr. Hamlet's assessment that "'paint chips were flying everywhere.'" Resp. at 2 (quoting CX 5 ¶ 58).

As the RRP Rule states, "[f]irms performing renovations must ensure that . . . [a]ll renovations performed by the firm are performed in accordance with the work practice standards in § 745.85." 40 C.F.R. § 745.89(d)(3). The work practice standards of § 745.85 further provide that prior to starting the renovation,

> the firm must isolate the work area so that no dust or debris leaves the work area while the renovation is being performed. In addition,

> the firm must maintain the integrity of the containment by ensuring that any plastic or other impermeable materials are not torn or displaced, and taking any other steps necessary to ensure that no dust or debris leaves the work area while the renovation is being performed.

40 C.F.R. § 745.85(a)(2). For exterior renovations, "[t]he firm must . . . [c]over the ground with plastic sheeting or other disposable impermeable material extending 10 feet beyond the perimeter of surfaces undergoing renovation or a sufficient distance to collect falling paint debris, whichever is greater, unless the property line prevents 10 feet of such ground covering." 40 C.F.R. § 745.85(a)(2)(ii)(C).

The undisputed evidence establishes that during its renovation of the Turnagain Property, Respondent did not comply with the work practice requirement to cover the ground with impermeable material. At the inspection, Ms. Farnham noted paint chips on the ground near the house and that there was no plastic sheeting on the ground around the house. CX 4A ¶¶ 73, 75, 77; CX 7 at 6; CX 94 at 3. And Mr. Hamlet describes the work site as "a general mess, in the sense that there was no containment being used, there was no plastic sheeting on the ground . . . and paint chips were flying everywhere. There were paint chips all over the bare ground." CX 5 ¶ 58. His declaration is buttressed by his photographs showing paint chips scattered in the dirt around the outside of the house and the absence of any impermeable ground covering. *See, e.g.*, CX 35–CX 36, CX 39–CX 40, CX 46. In its Answer, Respondent denies the Agency's allegations without elaboration. Answer ¶¶ 4.30–4.32. In its Response, Respondent also fails to offer or point to any evidence that would undermine the facts in the record that demonstrate that Respondent did not cover the ground with impermeable materials. Respondent hypothesizes that what Mr. Hamlet describes as "paint chips . . . flying everywhere was more than likely cottonwood floating around. The month of July in Alaska is known to have extensive pollen and cottonwood."[14] Resp. at 2. But this is generalized speculation about what Respondent thinks Mr. Hamlet *might* have seen. It is not supported by any specific evidence, and there is no reason to doubt Mr. Hamlet's ability to recognize paint chips. Notably, Respondent does not claim that its employees or anyone else *actually* saw pollen and cottonwood floating around during the inspection. In any event, Respondent's argument does not address the lack of impermeable material on the ground and has no bearing on the question of its presence or absence. Respondent has therefore failed to show that any facts on this point are in genuine dispute.

Accordingly, the undisputed material facts show that Respondent failed to cover the ground with impermeable material in accordance with the work standards outlined in 40 C.F.R. § 745.85(a)(2)(ii)(C). This violated 40 C.F.R. § 745.89(d)(3), and it is appropriate to grant accelerated decision to the Agency as to Respondent's liability for this violation.

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[14] Respondent further argues that if Mr. Hamlet had seen what he describes, then he and Ms. Farnham would have "implement[ed] a stop order on any work that was being performed at that very moment." Resp. at 2. But there is no evidence that Mr. Hamlet or Ms. Farnham had that authority in the first place. *See* Reply at 13 (Agency pointing out that TSCA and the RRP Rule do not authorize EPA inspectors to issue such orders).

V. Conclusion

For the foregoing reasons, the Agency's Motion is **GRANTED**. The Agency has shown by a preponderance of the evidence that Respondent violated the RRP Rule and TSCA as alleged in the Complaint. Respondent has not cited any evidence, or the absence of such evidence, that demonstrates a genuine dispute of material facts, and the Agency is entitled to judgment as a matter of law as to Respondent's liability. A hearing will be scheduled to determine an appropriate penalty.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: November 17, 2021
Washington, D.C.

In the Matter of *GreenBuild Design & Construction, LLC*, Respondent.
Docket No. TSCA-10-2021-0006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Accelerated Decision as to Liability**, dated November 17, 2021, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

Matt Barnwell
Attorney Advisor

Original by Electronic Delivery to:

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
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For Respondent

Dated: November 17, 2021
Washington, D.C.