BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	Docket No. TSCA-10-2021-0006
GREENBUILD DESIGN & CONSTRUCTION, LLC	)	**MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY**
Anchorage, Alaska	)	
Respondent.	)	
Proceeding pursuant to TSCA Section 16, 15 U.S.C. § 2615(a).	)	

MEMORANDUM IN SUPPORT OF MOTION FOR ACCELERATED DECISION

The United States Environmental Protection Agency ("Complainant"), moves for the issuance of an order granting an accelerated decision as to liability in favor of Complainant, and finding that Greenbuild Design & Construction, LLC ("Respondent"), violated Section 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2689, and the federal regulations promulgated thereunder, set forth at 40 C.F.R. Part 745, Subpart E. These regulations are known as the Lead Renovation, Repair and Painting Rule or RRP Rule.

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I. INTRODUCTION

From at least 2017 through 2018, Respondent repeatedly violated TSCA and the RRP Rule by renovating target housing without lead-safe work practices and by failing to consider the potential existence of lead-based paint hazards during the renovation of homes and apartments. Complainant made numerous attempts to assist Respondent in understanding its responsibilities under TSCA and the RRP Rule, but Respondent regularly ignored or refused those efforts.

Therefore, on December 2, 2020, Complainant filed the complaint in this matter, alleging in four counts that Respondent violated Section 409 of TSCA, 15 U.S.C. § 2689, and the RRP Rule. Respondent filed its Answer on January 27, 2021, largely denying Complainant's allegations. Pursuant to this Court's February 3 and March 2, 2021 orders, the parties filed their prehearing exchanges on April 19, May 17, and May 24, 2021, respectively.[1]

Complainant's allegations stem from a July 25, 2018 inspection on 2208 Turnagain Parkway, Anchorage, Alaska (the "Turnagain Property"), during which Complainant documented that Respondent's renovation of the Turnagain Property failed to comply with the RRP Rule. The RRP Rule requires firms like Respondent to obtain EPA certification prior to offering to perform, claiming to perform, or performing renovations for compensation in target housing. The RRP Rule also requires that all renovation activities, such as those Respondent conducted, be performed by a certified renovator or by individuals who have been trained by a certified renovator. Finally, the RRP Rule requires that firms like Respondent ensure renovations

[1] Pursuant to the Prehearing Order, the parties submitted copies of the exhibits the parties intend to produce at the hearing. Complainant's prehearing exchange was filed on April 19, 2021 ("CPHE"), Respondent's prehearing exchange was filed on May 17, 2021 ("RPHE"), and Complainant's rebuttal prehearing exchange was filed on May 24, 2021 ("CRPHE"). Pursuant to the Prehearing Order, the exhibits have been marked for identification as Complainant's exhibits ("CX") and Respondent's exhibits ("RX") and will be referred to herein as CX # and RX #.

of target housing are conducted according to certain lead-safe work practice standards. Respondent did not comply with any of these requirements.

II. STANDARD OF 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"). Regarding accelerated decisions, 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 [they] 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). The Environmental Appeals Board relies upon Federal Rules of Civil Procedure ("FRCP") Rule 56 and associated jurisprudence for guidance in adjudicating motions for accelerated decision. *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). This is because an "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." *LHP LLC*, EPA Docket No. TSCA-07-2014-0029, 2016 WL 2759699, at *3 (EPA ALJ Mar. 11, 2016) (citing *ICC Indus., Inc.*, 1991 EPA App. LEXIS 13, at *16 (CJO Dec. 2, 1991) ("An accelerated decision is comparable to a summary judgment…which by analogy provides guidance.")).

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 "purpose of summary judgment is to 'pierce the pleadings and to

assess the proof to see whether there is a genuine need for trial.'" *Zalcon, Inc.*, 2006 WL 1695609, at *4 (EPA ALJ May 23, 2006) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Summary judgment saves "the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures, as contemplated by the FRCP . . . with a net benefit to society." *Pure Gold, Inc. v. Syntex (USA), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984) (internal citation omitted).

Courts should grant a motion for summary judgment when the evidence, viewed in the light most favorable to the non-moving party, presents no genuine issue of material fact. *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 51 (2nd Cir. 1993). 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. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986); *LHP, LLC*, 2016 WL 2759699 at *4. A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. When reasonable minds cannot differ as to the import of evidence before the court, then there is no material factual issue. *Commander Oil Corp.*, 991 F.2d at 51 (citing *Anderson*, 447 U.S. at 250-51).

The party moving for summary judgment bears the initial responsibility of informing the Court of the basis for its motion and identifying materials in the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). 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. But, in opposing a properly supported motion, the nonmoving party may not rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Id*. at 248-49. Conclusory allegations or unsubstantiated speculation are insufficient to defeat a properly supported motion for summary judgment. *Fujitsu Ltd. v. Fed. Express Corp*., 247 F.3d 423, 428 (2nd Cir. 2001), *cert. denied*, 534 U.S. 891.

III. STATUTORY AND REGULATORY BACKGROUND

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act ("the Act") in response to finding that low-level lead poisoning was widespread among American children, that pre-1980 American housing stock contained more than three million tons of lead in the form of lead-based paint, and that the ingestion of lead from deteriorated or abraded lead-based paint was the most common cause of lead poisoning in children. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified as amended in scattered sections of 12, 15, and 42 U.S.C.); CX 100 at 179. One of the stated purposes of the Act is to ensure that the existence of lead-based paint hazards is considered during the renovation of homes and apartments. CX 100 at 180. To carry out this purpose, the Act added a new title to TSCA entitled "Title IV-Lead Exposure Reduction," which currently includes Sections 401 to 412 of TSCA, 15 U.S.C. §§ 2681-2692. *Id*. at 191.

Section 402 of TSCA, 15 U.S.C. § 2682, authorizes the Administrator of the EPA to promulgate final 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. The Administrator did so in 40 C.F.R. Part 745. Specifically, the RRP Rule, 40 C.F.R. Part 745, Subpart E, sets forth procedures and

requirements for, *inter alia*, the certification of renovation firms and individual renovators; work practice standards for renovation, repair, and painting activities in target housing and child-occupied facilities; and who may perform such renovation, repair, and painting activities. *See* 40 C.F.R. §§ 745.81(a)(2)-(3), 745.85(a)(2), 745.89(a), and 745.89(d)(3). 40 C.F.R. § 745.87(a) provides that failure or refusal to comply with any provision of the RRP Rule is a violation of Section 409 of TSCA, 15 U.S.C. § 2689.

The RRP Rule applies to all renovations performed for compensation in target housing. 40 C.F.R. § 745.82. "Renovation" is defined as the "modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement." 40 C.F.R. § 745.83. "Renovation" includes, but is not limited to, the 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. *Id*. The term renovation does not include minor repair and maintenance activities. *Id*.

"Minor repair and maintenance activities" is defined as 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 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. When removing painted components, or portions of painted

components, the entire surface area removed is the amount of painted surface disturbed. Jobs, other than emergency renovations, performed in the same room within the same 30 days must be considered the same job for the purpose of determining whether the job is a minor repair and maintenance activity. 40 C.F.R. § 745.83.

"Target housing" is defined as 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). Section 401(17) of TSCA, 15 U.S.C. § 2681(17); *see also*, 40 C.F.R. § 745.103.

IV. FACTUAL BACKGROUND

Respondent is a limited liability company with its principal place of business in the State of Alaska. CX 75. Respondent performs general contractor services, primarily construction of single-family houses, including new construction, additions, alterations, remodeling, and repair. CX 76. Mr. Rodrigo and Mrs. Kari Ann von Marees co-own Respondent. CX 75; CX 78.

In 2017 and 2018, Complainant communicated with Respondent multiple times about Respondent's responsibilities under TSCA. CX 80-85. On June 27, 2017, Complainant sent Respondent an inspection notice informing Respondent that Complainant wanted to perform an in-person inspection with Respondent on July 13, 2017. CX 80. The stated purpose of that inspection was to ensure that Respondent was complying with TSCA and the RRP Rule and provide any assistance that Respondent may require. *Id*. at 1. Respondent did not show up for the July 13, 2017 inspection.

On September 25, 2017, Complainant sent Respondent another inspection notice summarizing the RRP Rule and requesting an in-person inspection on October 12, 2017. CX 81. Because Respondent did not show up for the July 13, 2017 inspection, on October 3, 2017, EPA

Senior Environmental Employee and TSCA inspector Mr. Rob Hamlet called Respondent to make sure it was aware of the importance of the October 12, 2017 inspection. CX 82; CX 05 at 5.[2] Mr. Hamlet had a telephone conversation with Respondent on October 4, 2017 about the RRP Rule requirements and advised Respondent to attend the in-person inspection on October 12, 2017. CX 82; CX 05 at 5. Respondent said that it would come to that meeting, CX 05 at 5, but Respondent again failed to show up. CX 82-84.

On April 12, 2018, EPA TSCA Lead-Based Paint Enforcement and Compliance Officer Ms. Maria "Socky" Tartaglia called Respondent to have a detailed discussion about TSCA and the RRP Rule requirements. *See* CX 85. CX 06 at 2. During that conversation, Ms. Tartaglia informed Respondent that because it was not EPA firm certified it could not renovate pre-1978 housing and warned Respondent that in order to perform renovations on pre-1978 housing, it needed to be EPA firm certified. CX 06 at 2. *See also*, CX 11 (Respondent's EPA firm certification dated August 10, 2018). Respondent informed Ms. Tartaglia that it understood its requirements under the RRP Rule and would not perform renovations on pre-1978 housing anymore. CX 85; CX 06 at 2. To follow up, Ms. Tartaglia wrote Respondent a letter on April 25, 2018, repeating the RRP Rule requirements in detail. CX 85.

But Respondent did not follow through on its agreement to stop renovating target housing without being EPA firm certified as required by the RRP Rule. On June 13, 2018, Respondent obtained Building Permit R18-1823 for work to be completed on the Turnagain Property. CX 68.

[2] Complainant has put three "unsworn statements" into the record: CX 04 (Unsworn statement of Ms. Kim Farnham), CX 05 (Unsworn statement of Mr. Rob Hamlet) and CX 06 (Unsworn statement of Ms. Maria Tartaglia). Due to the COVID-19 pandemic, Complainant was unable to get its witnesses' affidavits notarized. Therefore, pursuant to 28 U.S.C. § 1746, Complainant's witnesses have all declared under penalty of perjury under the laws of the United States of America that their statements are true and correct. For convenience, Complainant will refer to these statements as declarations.

The Turnagain Property was built in 1953, making it a pre-1978 house. CX 86. Building permit R18-1823 indicated that Respondent would be doing an interior remodel of the Turnagain Property, to include drywall, electrical, plumbing, and roof repair. CX 68. Then on July 16, 2018, Respondent invoiced the owners of the Turnagain Property $128,580 for a "complete house remodel." CX 08, 09.[3]

Because Respondent obtained a building permit for work to be completed on target housing despite multiple warnings that it needed to be EPA firm certified in order to do so, Complainant sent Respondent another inspection notice on July 2, 2018. CX 92. That letter asked Respondent to attend an in-person inspection on July 26, 2018, so that Complainant could

[3] In its entirety, the invoice, CX 09, described the work Respondent would complete as follows:

> Complete house remodeling
> Demo all interior and open walls removing wood panels, drywall, insulation, electrical & plumbing; Framing new walls; All new electrical from new service meter, breaker panel and all new interior wiring; Install all outlets and switches, all lamps; Plumbing the entire house using Pex pipes, shower valves, supplies valves for bathrooms, laundry room and kitchen area; Boiler with baseboards for entire house; Trim all bathrooms and kitchen; Extra insulation for attic area and insulation for walls, seal all exterior walls and ceiling with 6mm vapor barrier; Drywall, taping for all interior and finishing with orange peel texture; Doors and windows package plus installation; Paint all interior and exterior; Paint all trims and doors; Tile for tub surround bathrooms and kitchen backsplash; Install all doors trim and wallbases.(Labor & materials); Install LVP flooring for main areas and carpet for bedrooms. (Labor & materials); All lamps and installation; New hand cable railing; Fixing front wall with new style siding like shaker cedar shingles; Complete new asphalt shingles roof with ridge vent for proper ventilation; New insulate garage door and opener; Refinish garage concrete floor with epoxy coating; Build new front porch entryway; Municipality permit and all inspection for complete this project.
>
> Structural beam
> Structural glue lam beam 20'x16"x5 1/8 for living room area; Structural glue lam beam 12'x12"x5 1/8" for master bedroom; Install beams and hang bottom trusses with hangers; Build extra posts for support beams and straps it down to secure
>
> Electrical work
> Install new circuit for porch lighting; 4 LED recess light

confirm Respondent's compliance with the RRP Rule, and asked Respondent to confirm that it would attend the inspection. CX 92.

By the time EPA Environmental Protection Specialist and TSCA inspector Ms. Kim Farnham and Mr. Hamlet left EPA Region 10 headquarters in Seattle, Washington for their inspection trip in Anchorage, Alaska, Respondent had not yet confirmed that it would attend the July 26, 2018 inspection. CX 04-06. So, on July 25, 2018, Ms. Tartaglia telephoned Respondent and asked if it would attend. CX 06. Respondent replied that it would be unable to attend that inspection and asked if it could be rescheduled. *Id*.

Rather than reschedule the inspection, Ms. Farnham and Mr. Hamlet decided to drive by Respondent's worksite to see if Respondent was there. CX 05, 06. When they arrived at the Turnagain Property on July 25, 2018, Respondent was there, actively working on the house. *See* CX 07, 14-55. Ms. Farnham and Mr. Hamlet then proceeded to perform an inspection of the Turnagain Property after presenting their federal credentials and a written notice of inspection, pursuant to their authority under Section 11 of TSCA, 15 U.S.C. § 2610. CX 04, 05; CX 07; CX 89. Ms. Farnham discussed the RRP Rule with Mr. von Marees, while Mr. Hamlet walked around the property, taking photographs, and closely observing its condition. CX 07, 14-55. Mr. Hamlet reported that "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…and paint chips were flying everywhere. There were paint chips all over the bare ground." CX 05 at 7.

V. ARGUMENT

Based on the July 25, 2018 inspection and Complainant's overall investigation of Respondent, Complainant alleged that Respondent violated the RRP Rule, and therefore Section 409 of TSCA, 15 U.S.C. § 2689, on at least four different occasions. *See* Complaint, ¶¶ 4.1-4.32.

In the Complaint, supported by Complainant's Prehearing Exchanges, Complainant established a prima facie case for each of these four violations of the RRP Rule. And, even when viewed in the light most favorable to Respondent, the evidence shows that there is no genuine issue as to any material fact and Complainant is entitled to judgment as a matter of law.

A. The RRP Rule applies to Respondent's activities at the Turnagain Property

The RRP Rule "applies to all renovations performed for compensation in target housing…." 40 C.F.R. § 745.82(a). Respondent's activities on the Turnagain Property were (1) a renovation (2) for compensation (3) in target housing, and therefore the RRP Rule applies to Respondent's activities at the Turnagain Property. "[T]he issue of whether Respondent performed renovation activity regulated by the RRP Rule…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." *LHP, LLC*, 2016 WL 2759699 at *9.[4] Respondent implied that its activity at the Turnagain Property were not a renovation. But there is no genuine dispute as to any material facts that Respondent renovated the Turnagain Property, and the record, taken as a whole, cannot lead a rational trier of fact to find for Respondent. *Matsushita*, 475 U.S. at 587.

1. Respondent performed a renovation on the Turnagain Property

Recognizing the lead-based paint hazards created by the disturbance of painted surfaces, the RRP Rule, 40 C.F.R. § 745.83, defines "renovation" as, *inter alia*, "the modification of any existing structures, or portion thereof, that results in the disturbance of painted

[4] As far as Complainant can tell, *LHP, LLC* is the only time the RRP Rule has been interpreted by this Tribunal, the EAB, or a Court of Law. As such, many of the issues raised herein may be matters of first impression for this Tribunal. Nevertheless, because there are no genuine issues of material fact present and Complainant is entitled to judgment as a matter of law, accelerated decision is warranted.

surfaces . . . [including] the removal, modification or repair of painted surfaces or painted components . . . [and] the removal of building components." Because Respondent modified existing structures in such a manner as to disturb painted surfaces, removed and modified painted surfaces and components, and removed building components of the Turnagain property, Respondent performed a renovation on the Turnagain Property. In Respondent's own words, the work it performed at the Turnagain Property was a "complete house remodel." CX 09 at 1.

When Ms. Farnham and Mr. Hamlet arrived at the Turnagain Property on July 25, 2018, Respondent and its employees were actively performing work on the property. *See* CX 07, 14-55. Respondent removed much of the interior of the Turnagain Property, so that only structural supports stood inside. *See, e.g.*, CX 38, 51 (photographs taken by Mr. Hamlet during the July 25, 2018 inspection, from outside of the Turnagain Property looking in, depicting an entirely gutted portion of the house with only structural supports left standing).[5]

By tearing out most of the interior of the Turnagain Property and leaving only structural supports standing, Respondent removed painted surfaces, painted components, and building components. *See* CX 64 at 7 (online real estate listing obtained by Ms. Farnham depicting the interior of the Turnagain Property before Respondent's renovation, showing the presence of a painted ceiling); CX 64 at 10 (online real estate listing obtained by Ms. Farnham depicting the interior of the Turnagain Property before Respondent's renovation, showing a painted ceiling and papered wall). *Compare* CX 65 at 6 (online real estate listing obtained by Ms. Farnham

[5] To be clear, this was not a "whole house gut rehabilitation project" as Respondent did not demolish and then rebuild the Turnagain Property to a point where it was effectively new construction. *See*, U.S. ENVTL PROT. AGENCY, *What is a "whole house gut rehabilitation project" for Lead Renovation, Repair and Painting (RRP) Rule purposes?*, available at, https://www.epa.gov/lead/what-whole-house-gut-rehabilitation-project-lead-renovation-repair-and-painting-rrp-rule.

depicting the front room of the Turnagain Property, as evidenced by the location of the front window, before Respondent's renovation, showing a painted ceiling and painted wall) *with* CX 66 at 6 (online real estate listing obtained by Ms. Farnham depicting the front room of the Turnagain Property, as evidenced by the location of the front window, after Respondent's renovation, showing that the painted wall in front of the stairs was demolished). *See also*, CX 09 (invoicing the owners of the Turnagain Property for Respondent's work, including "Demo all interior and open walls removing wood panels, drywall, insulation, electrical & plumbing.").

Further, during its work on the exterior of the Turnagain Property, Respondent modified painted surfaces. Respondent installed new siding on three of the Turnagain Property's four sides, painted the upper portion of those three sides and the entirety of the fourth side of the Turnagain Property, and power washed building components. *Compare* CX 64 at 3, 5; CX 65 at 1-3 *with* CX 61. *See also* CX 8 at 13 (Respondent will "Replace front, north and south side exterior walls of home with new Cedar Shake shingles…prep, pressure wash, and paint exterior. Replace any other damaged siding and trim as needed. Repair and replace any fascia as needed. Repair and replace any damaged framing."). In doing so, Respondent disturbed and modified painted surfaces.

Therefore, because Respondent's activities at the Turnagain Property modified existing structures, removed and modified painted surfaces and painted components, and removed building components, all of which resulted in the disturbance of painted surfaces, Respondent performed a renovation. 40 C.F.R. § 745.83.

a. Respondent's implication that its activities outside the Turnagain Property were not a renovation are meritless

In its Answer, Respondent alleged that its actions on the exterior of the Turnagain Property were not a renovation because it was only pressure washing new siding: "Respondent

admits to overseeing workers performing renovations and pressure washing new siding on the exterior of the home. The siding pressure washed by Respondent was new siding, therefore, no violations of any EPA statutes or regulations." Answer ¶ 3.13. *See* 40 C.F.R. § 745.83 (definition of "renovation" as including "the modification of any *existing* structure, or portion thereof") (emphasis added).[6] This argument is factually inaccurate, and the record is replete with evidence providing as such. But, even if Respondent's assertion were true, Respondent's overall activities on the Turnagain Property would still qualify as a renovation because Respondent removed the Turnagain Property's windows and modified painted surfaces on the exterior of the Turnagain Property.

Respondent's argument that its pressure washing was not a renovation because it was only pressure washing new siding is factually inaccurate. Mr. Hamlet directly observed and took pictures of Respondent's employees pressure washing the Turnagain Property's existing soffits and eaves. CX 22 (photograph taken by Mr. Hamlet during the July 25, 2018 inspection, depicting a worker pressure washing the existing eaves); CX 54, 55 (photographs taken by Mr. Hamlet during the July 25, 2018 inspection, depicting the existing portion of the Turnagain Property that Respondent pressure washed). Mr. Hamlet also observed Respondent pressure washing the rear of the Turnagain Property. Because Respondent only installed new siding on the front and sides of the Turnagain Property, CX 8 at 13, Respondent could only have been pressure washing existing surfaces when pressure washing the rear of the property.

Respondent offered nothing to counter the photographs in the record directly showing Respondent's employee pressure washing the Turnagain Property's eaves—which is an existing

[6] Though Respondent did not elaborate, Complainant reads this as Respondent arguing that because it only pressure washed the new siding, it could not have modified the existing structure, and therefore its pressure washing activities did not constitute a renovation. 40 C.F.R. § 745.83.

structure and not new siding. *See generally,* RPHE. While Respondent asserted in its Answer that its employees were not pressure washing the existing structure, Respondent offered no evidence to support this. The only evidence in the record directly shows Respondent's employee pressure washing existing surfaces. *See, e.g.*, CX 22. Therefore, there is no genuine issue of material fact here. *Anderson*, 477 U.S. at 248 (a factual dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Horta v. Sullivan*, 4 F.3d 2, 11 (1st Cir. 1993) (determining that mere allegations or conjecture unsupported in the record are insufficient to raise a genuine issue of material fact).

But, even if this Court accepts Respondent's argument that its pressure washing was not a renovation because it only pressure washed new siding, Respondent still conducted a renovation. In making its argument, Respondent ignores the fact that the definition of renovation includes the removal of windows and, more broadly, the modification of painted surfaces. *See* 40 C.F.R. § 745.83 (defining "renovation" as including "the removal of building components (e.g., walls, ceilings, plumbing, *windows*)") (emphasis added). Here, Respondent removed and replaced the Turnagain Property's windows. *See* CX 09 (invoicing the property owners for the "doors and windows package plus installation"); and CX 08 at 12 (agreeing to "supply and install new vinyl windows throughout"). Mr. Hamlet and Ms. Farnham both observed that the front window of the Turnagain Property was new. *See, e.g.*, CX 05 at 8. Mr. Hamlet took pictures during the inspection that show the front window was replaced. *Compare, e.g.*, CX 62 at 1 and CX 64 at 3 *with* CX 61. *See also*, CX 32, 33, 47, 48. Therefore, as Respondent removed and replaced the Turnagain Property's windows, it performed a renovation.

Respondent also modified painted surfaces by preparing the Turnagain Property's exterior walls, and then installing new siding on the walls. *Compare* CX 64 at 3, 5; CX 65 at 1-3

with CX 61. *See also* CX 8 at 13 (Respondent will "Replace front, north and south side exterior walls of home with new Cedar Shake shingles…prep, pressure wash, and paint exterior. Replace any other damaged siding and trim as needed. Repair and replace any fascia as needed. Repair and replace any damaged framing."). So, even if this Court were to assume that the only thing Respondent pressure washed was new surfaces, Respondent still prepped the exterior walls then installed the new siding. CX 8 at 13; CX 61. *See also* Answer, ¶3.13 ("Respondent admits to overseeing workers performing renovations . . ."). Preparing the exterior walls and installing new siding are the modification of painted surfaces, irrespective of whether Respondent was pressure washing existing structures or new siding.

Therefore, there is no genuine issue of material fact with respect to whether Respondent renovated the exterior of the Turnagain Property. A genuine issue for the purposes of precluding summary judgment "is one that only a finder of fact can properly resolve because it may reasonably be resolved in favor of either party and a 'material' issue is one that affects the outcome of the suit." *Zehner v. Cent. Berkshire Reg'l Sch. Dist.*, 921 F. Supp. 850, 857 (D. Mass. 1995) (quoting *Collins v. Martella*, 17 F.2d 1, 3 n.3 (1st Cir. 1994)). Respondent has not proffered any evidence to back up the assertion that it only pressure washed the new siding. And by replacing the windows, preparing the exterior walls, and installing the new siding, Respondent renovated the Turnagain Property. Therefore, there is no genuine issue of material fact that could preclude summary judgment.

b. Respondent's implication that its activities inside the Turnagain Property were not a renovation are meritless

Respondent also implied that its activities inside the Turnagain Property were not a renovation because it did not disturb painted surfaces. Instead, Respondent asserted that the surface in question was wood paneling. Answer, ¶3.8. This is factually inaccurate, and the record

is replete with evidence providing as such. But, even if true, Respondent's activities on the exterior of the Turnagain Property are still a renovation, which would trigger the RRP Rule. Therefore, there is no genuine issue as to whether Respondent renovated the Turnagain Property.

Respondent's argument that the interior of the Turnagain Property was entirely wood paneling is factually inaccurate. Ms. Farnham obtained numerous online real estate listings of the Turnagain Property that included pictures taken before Respondent's renovation. Those pictures show that while some of the Turnagain Property was wood paneling, there were still painted surfaces. *See, e.g.*, CX 64 at 7, CX 64 at 10, and CX 65 at 6. Respondent removed those portions of the Turnagain Property. *See supra,* Section V(A)(1). *Compare, e.g.*, CX 65 at 6 (online real estate listing obtained by Ms. Farnham depicting the front room of the Turnagain Property, as evidenced by the location of the front window, before Respondent's renovation, showing a painted ceiling and painted wall) *with* CX 66 at 6 (online real estate listing obtained by Ms. Farnham depicting the front room of the Turnagain Property, as evidenced by the location of the front window, after Respondent's renovation, showing that the painted wall in front of the stairs was torn down). Therefore, Respondent conducted an interior renovation of the Turnagain Property by removing painted components and may not simply rest upon mere allegations or denials in its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. *See Fujitsu Ltd.*, 247 F.3d at 428 (noting that "the nonmoving party may not rely on conclusory allegations or unsubstantiated speculation" to defeat a motion for summary judgment).

Moreover, Respondent effectively admitted that the Turnagain Property had internal painted surfaces. In its Answer, Respondent claimed that it performed a lead test on interior surfaces at the Turnagain Property. Answer, ¶ 4.5; RPHE at 1-2; RX 1. *See infra*, Section

V(B)(1) (explaining why the lead tests Respondent purportedly performed are nevertheless immaterial). Lead tests are only designed to be performed on painted surfaces; they would be useless on wood paneling. *See, e.g.*, CX 105. Respondent cannot have it both ways: either the interior of the Turnagain Property was entirely wood paneling—it wasn't—or Respondent tested the interior painted surfaces.

Further, lead tests are only intended to be used on "components affected by the renovation." 40 C.F.R. § 745.82(a)(2). It would not make sense for Respondent to test painted surfaces that it was not intending to impact during its renovation. Therefore, by informing the Court that it tested the Turnagain Property, Answer, ¶ 4.5, Respondent has admitted that there were painted surfaces in the Turnagain Property, which Respondent's activities affected. As such, Respondent impliedly admitted that its activities at the Turnagain Property were a renovation.

As the First Circuit said, there is a trial-worthy issue when the "evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." *Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo*, 394 F.3d 40, 42-43 (1st Cir. 2005). But here, Respondent's bare assertion that the entirety of the Turnagain Property was wood paneling without any proof supporting that assertion does not permit a rational factfinder to resolve the issue in Respondent's favor. *Id*. This is especially true when viewed in the context of the record; Complainant has submitted voluminous support while Respondent's sole exhibit—a purported lead test result—actually contradicts its own argument that there were no painted surfaces in the interior of the Turnagain

Property. *See Anderson*, 477 U.S. at 248 (a factual dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

Therefore, there is no genuine issue of material fact with respect to whether Respondent's activities inside the Turnagain Property were a renovation. But, even if this Court were to assume Respondent's argument was true, Respondent's activities on the exterior of the Turnagain Property are still a renovation, triggering the RRP Rule.

2. Respondent's renovation of the Turnagain Property was not minor repair and maintenance activities

Respondent's activities at the Turnagain Property were a renovation and not minor repair and maintenance activities. The definition of renovation specifically states that it does not include "minor repair and maintenance activities." 40 C.F.R. § 745.83. "Minor repair and maintenance activities" are defined as:

> 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 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 . . . .

Id.

Respondent's activities at the Turnagain Property were not minor repair and maintenance activities. Respondent replaced windows and demolished painted surfaces, disrupted more than six square feet of interior painted surfaces, and disrupted more than 20 square feet of exterior painted surfaces at the Turnagain Property. And, as the definition of minor repair and maintenance activities is not conjunctive, any one of these actions would remove Respondent's activities from within the definition. *Id*. Therefore, there is no genuine dispute as to any material

fact related to whether Respondent's renovation activities could qualify as minor repair and maintenance activities.

a. Respondent replaced windows and demolished painted surfaces

First, Respondent's activities at the Turnagain Property were not minor repair and maintenance activities as Respondent replaced the Turnagain Property's windows and demolished painted surfaces. Respondent invoiced the owners of the Turnagain Property for the "doors and windows package plus installation" CX 09. Respondent and the owners of the Turnagain Property agreed to a contract in which Respondent stated it would "supply and install new vinyl windows throughout." CX 08 at 12. Mr. Hamlet and Ms. Farnham both observed that the front window of the Turnagain Property was new. CX 05 at 8. Pictures taken of the Turnagain Property show that the front window was replaced. *Compare, e.g.*, CX 62 at 1 and CX 64 at 3 *with* CX 61. *See also*, CX 32, 33, 47, 48.

The definition of "minor repair and maintenance activities" specifically excludes situations where the work involves window replacement or demolition of painted surface areas. 40 C.F.R. § 745.83. Therefore, even if this Court were to assume that Respondent did not disrupt more than six square feet of interior painted surfaces or 20 square feet of exterior painted surfaces, as further elaborated upon below, the fact that Respondent both demolished painted surfaces and replaced windows means that Respondent's activities at the Turnagain Property constituted a renovation and not minor repair and maintenance activities. Respondent has made no attempt to argue that it did not replace windows or demolish painted surfaces, or otherwise offer any evidence to counter Complainant's allegations. *Anderson*, 477 U.S. at 248 ("only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

Therefore, there is no genuine dispute as to any material fact that Respondent renovated the Turnagain Property and did not perform minor repair and maintenance activities.

b. Respondent disrupted more than six square feet of interior painted surfaces

Second, Respondent's activities at the Turnagain Property were not minor repair and maintenance activities because Respondent disrupted more than six square feet of interior painted surfaces.

Respondent demolished at least one painted wall in the front room of the Turnagain Property. *See supra,* Section V(A)(1). *Compare* CX 65 at 6 *with* CX 66 at 6. As the area of a wall is equal to its length times its height, for this wall to have an area less than six square feet, it would be impracticably small. For example, if that wall were just five feet high, it could only have been 1.2 feet long to have an area of six square feet or less. But, since the wall appears to have a similarly sized length and height, CX 65 at 6, it would have to be less than 2.5 feet long and 2.5 feet high for it to have an area of six square feet or less. It is unreasonable to believe this was the case. *See* CX 32, 38 (photographs Mr. Hamlet took during the July 25, 2018 inspection depicting the front door of the Turnagain Property, which indicates that it is reasonable to assume that the front room, into which the door enters, is more than five feet high). Therefore, though Complainant does not have a precise measurement of the demolished wall, the evidence indicates that the Respondent disrupted more than six square feet of interior painted surfaces.

c. Respondent disrupted more than 20 square feet of exterior painted surfaces

Third, Respondent's activities at the Turnagain Property were not minor repair and maintenance activities because Respondent disrupted more than 20 square feet of exterior painted surfaces when it pressure washed and completed other activities on the Turnagain Property. *See supra,* Section V(A)(1). During the July 25, 2018 inspection Mr. Hamlet observed

Respondent pressure washing the Turnagain Property's soffits, eaves, and rear exterior wall. CX 07; CX 05 at 7. The available evidence, including the inspection photographs and Mr. Hamlet's declaration, indicates that this work disturbed more than 20 square feet of exterior painted surfaces. CX 05. *See also, e.g.*, CX 42 (photograph taken by Mr. Hamlet during the July 25, 2018 inspection showing multiple people standing around the rear of the Turnagain Property, whose height can be used as a comparison to show that the Turnagain Property's exterior walls were higher than the average person's height).

Even if Respondent had only pressure washed the Turnagain Property's soffits and eaves, that alone would encompass more than 20 square feet. But, Respondent also pressure washed the rear side of the house, which itself is more than 20 square feet of painted surfaces.[7] CX 61. And Respondent also prepped and installed new siding on the exterior. CX 8 at 13. Therefore, though Complainant does not have a precise measurement of the Turnagain Property, the available evidence indicates that the Respondent disrupted more than 20 square feet of exterior painted surfaces.

3. Respondent's renovation of the Turnagain Property was for compensation

Respondent's renovation of the Turnagain Property was for compensation. On July 16, 2018, Respondent charged the owners of the Turnagain Property $128,580 for its renovation services. CX 09. The invoice that Respondent provided to the owners of the Turnagain Property indicated that Respondent had already been paid $114,917.52 for its work on the Turnagain Property and was still owed $13,662.48. *Id*. *See also* CX 8 at 8 (Contract between Respondent and the owners of the Turnagain Property for the sum of $127,000, payable to Respondent for its

[7] Again, the area of a wall is its length times its height. So, assuming the back side of the house is at least five feet high, its entire length would have to be less than four feet long to be less than 20 square feet.

performance of work on the property). Therefore, Respondent's renovation of the Turnagain property was for compensation.

As Respondent has not rebutted this evidence at all, and in fact impliedly admitted it, *see* Answer, ¶3.7 (admitting that an estimate was provided to the owners of the Turnagain Property), there is no issue of material fact with respect to whether Respondent's renovation was for compensation.

4. The Turnagain Property is target housing

The Turnagain Property, which was built in 1953, qualifies as target housing. Section 401 of TSCA, 15 U.S.C. § 2681, defines "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling . . . ." According to the Public Inquiry Parcel Details provided by the Municipality of Anchorage, the Turnagain Property was built in 1953 and consists of 3 bedrooms. CX 86. As such, the Turnagain Property was constructed prior to 1978, and is not a 0-bedroom dwelling. Therefore, the Turnagain Property is "target housing."

As Respondent has not rebutted this evidence at all, there is no issue of material fact with respect to whether the Turnagain Property is target housing. *See also*, Complaint, ¶¶3.4-3.5; Answer, ¶¶3.4-3.5; CPHE at 11 (Respondent's failure to admit, deny, or explain whether the Turnagain Property was built in 1953 constitutes an admission of the allegation. 40 C.F.R. § 22.15(d)).

* * * *

Respondent's activities at the Turnagain Property were: (1) a renovation; (2) for compensation; and (3) in target housing. Respondent's attempts to avoid that conclusion are factually inaccurate, not supported in the record, and present disputes over facts that would not

affect the outcome of this suit. Therefore, there is no genuine dispute of material fact as to whether the RRP Rule applies to Respondent's renovation of the Turnagain Property and Complainant is entitled to judgment as a matter of law.

B. Respondent's implication that its activities are exempt from the RRP Rule pursuant to 40 C.F.R. § 745.82(a)(2) is meritless

In its Answer, Respondent implied that the RRP Rule does not apply to its renovation of the Turnagain Property because "the lead test performed was negative." Answer, ¶ 4.5. In its prehearing exchange, Respondent proffered RX 1 to support this assertion. Respondent purports that RX 1 is "Photos of the Lead sample test taken prior to work completed on the [Turnagain Property]. The photo shows a negative test result for lead." RPHE at 1. RX 1 (depicting a photograph of a 3M Lead Check Test confirmation card, *not* a negative test result for lead); *see infra*, Section V(B)(2).

The regulation at 40 C.F.R. § 745.87(e) provides that "lead-based paint is assumed to be present at renovations covered by" the RRP Rule. To overcome that assumption, it is incumbent upon Respondent to show that the exceptions in 40 C.F.R. § 745.82(a) apply. The regulation at 40 C.F.R. § 745.82(a) provides, in relevant part, that the RRP Rule "applies to all renovations performed for compensation in target housing . . . except for the following:"

> Renovations in target housing . . . in which a certified renovator, using an EPA recognized test kit as defined in §745.83 and following the kit manufacturer's instructions, has tested each component affected by the renovation and determined that the components are free of paint or other surface coatings that contain lead equal to or in excess of 1.0mg/cm^2 or 0.5% by weight.

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

By indicating that the "lead test performed was negative," Answer ¶ 4.5, Respondent is essentially arguing that the (a)(2) exception applies to its renovation of the Turnagain Property. But this argument is meritless for numerous reasons. First, because Mr. von Marees was not a

certified renovator when he tested the Turnagain Property, the terms of the (a)(2) exception indicate that it cannot apply. Further, as RX 1 is a 3M Lead Check Test confirmation card, not a negative test result for lead as Respondent purports it to be, *see infra*, Section V(B)(2), (3), RX 1, itself, actually indicates that the (a)(2) exception cannot apply.

1. The (a)(2) exception does not apply because Mr. von Marees was not a certified renovator when he allegedly tested for lead

By its own terms, the (a)(2) exception only applies when a *certified renovator* tests the building components for the presence of lead. 40 C.F.R. § 745.82(a)(2) (emphasis added). Here, Respondent's co-owner, Mr. Rodrigo von Marees was not a certified renovator before Respondent began work on the Turnagain Property.[8] Answer ¶ 4.5; CX 11, 12. *See* 40 C.F.R. § 745.83 (defining a certified renovator as "a renovator who has successfully completed a renovator course accredited by EPA or an EPA-authorized State or Tribal Program."). *See also* 40 C.F.R. § 745.90 ("To become a certified renovator…an individual must successfully complete the appropriate course accredited by EPA under §745.225 or by a State or Tribal program that is authorized under Subpart Q of this part.").

Respondent has implied that it cannot be held liable for violating the RRP Rule, as it obtained training required by the State of Alaska. *See* RPHE at 2. Complainant interpreted this as an argument that Respondent's co-owner, Mr. von Marees, was a certified renovator prior to the July 25, 2018 inspection.[9] But, other than a brief mention in its prehearing exchange relating to

[8] Mr. von Marees has represented to Complainant that he was the individual who tested the Turnagain Property for lead.

[9] Complainant reads Respondent's assertion as arguing that Mr. von Marees took some sort of renovator training required by the State of Alaska. It is undisputed, here, that Respondent was not firm certified by EPA, pursuant to 40 C.F.R. § 745.89 prior to the July 25, 2018 inspection. CX 11, 12. Renovator certification and firm certification are distinct requirements. Respondent needed to be EPA firm certified prior to offering to perform or performing renovations for

whether Complainant has treated Respondent fairly, *id*., Respondent has not supported this assertion at all. Notably missing from Respondent's prehearing exchange is any proof that it completed relevant training, that it is certified by Alaska, or what that training entailed. *See Horta*, 4 F. 3d at 11 (mere allegations or conjecture unsupported in the record are insufficient to raise a genuine issue of material fact).

But, even if Respondent had offered any documentation to support its argument that Mr. von Marees was certified by the State of Alaska prior to renovating the Turnagain Property, that would have been immaterial. "To become a certified renovator . . . an individual must successfully complete the appropriate course accredited by EPA under §745.225 or by a State or Tribal program that is authorized under subpart Q of this part." 40 C.F.R. § 745.90. Mr. von Marees did not take an EPA-accredited training course until after the July 25, 2018 inspection. *See* CX 12. While states can apply to EPA for authorization to administer and enforce the Lead-Based Paint Program, *see* 40 C.F.R. § 745.320, Alaska has not done so. *See* 40 C.F.R. Part 745, Subpart Q. Therefore, any requirements that the State of Alaska places on Respondent are separate and distinct from any requirements that the RRP Rule places on Respondent. So, Mr. von Marees was not a certified renovator according to the RRP Rule when he purportedly tested the Turnagain Property for lead.

Therefore, even if this Court were to assume that Respondent's argument is entirely accurate—namely, that Mr. von Marees, who was trained by the State of Alaska, tested the Turnagain Property for the presence of lead prior to renovating it, and that test came back negative—because Mr. von Marees was not a certified renovator pursuant to the RRP Rule at the

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compensation in target housing. 40 C.F.R. §§ 745.81(a)(2)(ii), 745.89. Additionally, a certified renovator had to oversee Respondent's renovation of target housing and, among other things, ensure that the workplace standards of 40 C.F.R. § 745.85 were followed. 40 C.F.R. § 745.90(b).

time he tested the Turnagain Property, the (a)(2) exception cannot apply. *See*, *Ricci v. DeStafano*, 557 U.S. 586, 129 S. Ct. 2658 (2009) (determining that where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial).

2. The (a)(2) exception does not apply because RX 1 indicates that Respondent did not follow the test kit manufacturer's instructions

Further, contrary to Respondent's assertion, the evidence Respondent cited does not show "a negative test result for lead." RPHE at 1. Rather, RX 1 is a 3M Lead Check Test confirmation card.

The 3M brand Lead Check Test is an EPA recognized test kit as defined in 40 C.F.R. § 745.83. *See* 40 C.F.R. § 745.82(a)(2). To properly use the 3M brand Lead Check Test on painted wood,[10] a certified renovator must cut a gouge into the painted surface to be tested, through all of the layers of paint and down to the bare wood. CX 105 (3M Lead Check Swab Instruction Manual, *available at*, https://www.doh.wa.gov/Portals/1/Documents/4000/LeadCheck_Swab_Manual.pdf). The certified renovator must then activate the Lead Check Test swab by squeezing the internal ampules with enough pressure to ensure that they break, so the reagent liquids inside of the swab are able to mix and so the reagent liquid wets the end of the swab. *Id*. The certified renovator then must firmly rub the wet tip of the Lead Check Test swab across the gouged painted surface, continually squeezing the sides of the tube so that the tip remains wet. If the test detects the presence of lead, the swab tip and/or test surface will turn pink or red. *Id*.

If the test is negative, the certified renovator should then squeeze a drop of the reagent liquid from the Lead Check Test swab onto the confirmation card, inside one of the black-

[10] The 3M brand Lead Check Test can also be used on other painted surfaces such as metal and drywall. CX 105.

outlined circles. This tests whether the reagent liquid is properly working. There is a small amount of lead on the test confirmation card, so if the reagent liquid is properly working the space within the black circle on the confirmation card will turn red.[11]

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

The fact that Respondent represents that RX 1 is a negative test result further indicates that the (a)(2) exception cannot apply here. The (a)(2) exception applies when a "certified renovator, using an EPA recognized test kit as defined in § 745.83 and *following the kit manufacturer's instructions*, has tested each component . . . ." 40 C.F.R. § 745.82(a)(2) (emphasis added). But, by indicating that the confirmation card is, itself, a negative test result, Respondent suggests that it did not conduct the lead test properly or follow the kit manufacturer's instructions. Therefore, the (a)(2) exception cannot apply here.

3. RX 1 also indicates that the (a)(2) exception does not apply because Respondent failed to test each component affected by the renovation

Finally, RX 1 also indicates that the (a)(2) exception cannot apply here because Respondent failed to test "each component affected by the renovation." *Id*. At most, RX 1 confirms that up to four 3M Lead Check Test swabs were functional. But to test "each

[11] *See* https://multimedia.3m.com/mws/media/894181O/3m-leadcheck-swabs.mp4 for an instructional video prepared by 3M describing how to properly use the 3M Lead Check Test kit. Additional helpful videos prepared by 3M can be found here: https://multimedia.3m.com/mws/media/1421741O/why-and-where-to-test-for-lead-chim-frameworks-video.mp4; https://multimedia.3m.com/mws/media/1421740O/how-to-3m-leadcheck-swabs.mp4; and https://multimedia.3m.com/mws/media/894213O/3m-leadcheck-swabs-demo-video.mp4.

component affected by the renovation," *id*., Respondent would have needed more than four swabs.

Respondent's renovation of the Turnagain Property affected the exterior walls, the soffits and eaves, the internal ceilings, the windows, and the interior painted or wallpapered walls. *See, e.g.*, CPHE at 11-13, 16-17. Each of these components would have required a separate swab in order for Respondent to test each component affected by the renovation. 40 C.F.R. § 745.82(a)(2). *See also*, CX 105. Therefore, even if RX 1 was what Respondent purported it to be, Respondent has not shown that it tested each component of the Turnagain Property affected by the renovation and therefore Respondent did not comply with the terms of the (a)(2) exception.

* * * *

Therefore, there is no genuine issue of material fact as to whether the (a)(2) exception applies to Respondent's renovation of the Turnagain Property. It does not. Because lead-based paint is assumed to be present at renovations covered by the RRP Rule, 40 C.F.R. § 745.87(e), Respondent failed to meet its burden to show that the exceptions in 40 C.F.R. § 745.82(a) apply.

As the First Circuit noted, "as to issues on which the [summary judgment] nonmovant has the burden of proof, the movant need do no more than aver 'an absence of evidence to support the nonmoving party's case.'" *Mottolo v. Fireman's Fund Ins. Co.*, 43 F.3d 723, 725 (1st Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 322). "The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question of fact that is both 'genuine' and 'material.' The nonmovant, however, may not rest upon mere denial of the pleadings." *Id*. (citing *Anderson*, 477 U.S. at 248 and Fed. R. Civ. P. 56). *See also*, *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1196 (5th Cir. 1986) (determining that if it is

evident that the party seeking summary judgment against one who bears the burden of proof has no access to evidence of disproof, and ample time has been allowed for discovery, the movant should be permitted to reply upon complete absence of proof of an essential element of the nonmovant's case in moving for summary judgment).

Here, even if this Court were to assume that Respondent's counterarguments were accurate—that Mr. von Marees tested the Turnagain Property for the presence of lead and that test came back negative—that still would not mean that the (a)(2) exception applies because Mr. von Marees was not a certified renovator when he allegedly conducted that test. Similarly, since Respondent did not follow the kit manufacturer's instructions and could not have tested each component of the Turnagain Property affected by the renovation with the four test swabs Respondent claims it used, a reasonable jury could not find that the (a)(2) exception applies here. *Anderson*, 477 U.S. at 248; 40 C.F.R. § 745.82(a)(2). Therefore, Respondent has not overcome the presumption that lead-based paint was present at the Turnagain Property, and there is no genuine issue of material fact as to whether the (a)(2) exception applies. As such, the RRP Rule applies to Respondent's renovation of the Turnagain Property.

C. Because the RRP Rule applies to Respondent's renovation of the Turnagain Property, Respondent's failures to comply with the RRP Rule were violations of TSCA

There is no genuine dispute as to any material fact surrounding whether Respondent violated the RRP Rule, and as such, Complainant is entitled to judgment as a matter of law. *See* FRCP 56(a). The majority of Respondent's counterarguments focus on whether the RRP Rule applies to its renovation of the Turnagain Property in the first place. As Complainant established that the RRP Rule applies to Respondent's renovation of the Turnagain Property, Respondent's

failures to comply with the requirements of the RRP Rule were violations of Section 409 of TSCA, 15 U.S.C. § 2689.

1. Respondent failed to obtain EPA firm certification (COUNT ONE)

Under 40 C.F.R. § 745.81(a)(2)(ii), no firm may perform, offer, or claim to perform renovations in target housing or child-occupied facilities without certification from EPA under 40 C.F.R. § 745.89. Respondent: (1) is a firm, that (2) offered to perform, then actually performed a renovation, (3) in target housing, (4) without EPA firm certification. *See* 40 C.F.R. § 745.89 ("Firms that perform renovations for compensation must apply to EPA for certification to perform renovations or dust sampling."). Therefore, Respondent violated 40 C.F.R. § 745.81(a)(2)(ii).

(1) Respondent is a firm. 40 C.F.R. § 745.83 defines "firm" as "a company, partnership, corporation, sole proprietorship or individual doing business, association, or other business entity; a Federal, State, Tribal, or local government agency; or a nonprofit organization." Respondent is a limited liability company with its principal place of business in the State of Alaska. CX 75. Therefore, Respondent is a firm, according to 40 C.F.R. § 745.83, and there is nothing in the record to suggest otherwise. *See* Answer, ¶3.1 (Admitting that Respondent is a limited liability company).

(2) Respondent offered to perform, then performed, a renovation on the Turnagain Property. Respondent offered to perform a renovation on the Turnagain Property. This is evidenced by the fact that Respondent: (1) obtained a building permit to perform drywall, electrical, plumbing work, and roof repair on the Turnagain Property, CX 68; and (2) agreed to a contract with the owners of the Turnagain Property, where Respondent promised to perform extensive work on the property in exchange for $127,000. CX 08 at 8, 10-14. *See* Answer,

¶¶ 3.3, 3.7, 4.3 (Admitting that Respondent obtained a building permit for the Turnagain Property and invoiced the owners of the Turnagain Property for its services).

Then Respondent actually performed a renovation on the Turnagain Property. *See supra,* Section V(A). Respondent modified existing structures in such a manner as to disturb painted surfaces, removed and modified painted surfaces and components, and removed building components from the Turnagain property. Respondent removed a portion of the interior of the Turnagain Property so that only structural supports were left standing inside, including demolishing at least one interior painted wall. CX 38, 51, 65 at 6. Respondent installed new siding and shingles on three of the Turnagain Property's four sides, painted the upper portion of those three sides and the entirety of the fourth side of the Turnagain Property, and power washed building components. *Compare* CX 64 at 3, 5; CX 65 at 1-3 *with* CX 61. *See also* CX 8 at 13. Additionally, Respondent replaced the Turnagain Property's windows. CX 08 at 12. CX 04, 05. *Compare, e.g.*, CX 62 at 1 and CX 64 at 3 *with* CX 61. *See also*, CX 32, 33, 47, 48. Therefore, Respondent performed a renovation on the Turnagain Property. 40 C.F.R. § 745.83. *See also*, Answer, ¶4.4 (Admitting to performing renovation services at the Turnagain Property); Answer, ¶4.12 (Admitting to performing renovation on the Turnagain Property).

(3) The Turnagain Property is target housing. The Turnagain Property was built in 1953 and consists of at least 3 bedrooms. CX 75. Therefore, the Turnagain Property is target housing. Section 401 of TSCA, 15 U.S.C. § 2681.

(4) Respondent was not firm certified by EPA until after it performed the renovation on the Turnagain Property. Respondent admitted that it was not firm certified by EPA in its Answer. *See* Answer, ¶4.5. Respondent was not firm certified by EPA until August 10, 2018. CX 11, 12. Respondent obtained its building permit for the Turnagain Property on June

13, 2018, CX 68, and was actively performing a renovation on the Turnagain Property during the July 25, 2018 inspection, CX 07. Respondent was not firm certified by EPA until after it offered to perform, and then actually performed, its renovation of the Turnagain Property.

Therefore, Respondent, a firm, offered to perform and then actually performed a renovation in target housing without certification from EPA, in violation of 40 C.F.R. § 745.81(a)(2)(ii). Complaint, ¶¶ 4.1 to 4.6. There is no genuine dispute as to any material facts associated with that conclusion. Nothing in the record suggests that Respondent is not a firm, that it did not offer to renovate the Turnagain Property, that the Turnagain Property is not target housing, or that Respondent was EPA firm certified prior to renovating the Turnagain Property. *See generally,* RPHE.

The only dispute that Respondent has put in the record is associated with whether it renovated the Turnagain Property. But, as Complainant established above, Respondent's counterarguments are factually inaccurate, not supported in the record, and present disputes over facts that would not affect the outcome of this suit. "A factual issue is 'genuine' if it may reasonably be resolved in favor of either party, and, therefore, requires the finder of fact to make choices between parties' differing versions of the truth at trial." *DePoutot v. Raffaelly*, 424 F.3d 112, 117 (1st Cir. 2005). Similarly, "material means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorable to the nonmovant." *Rojas*, 394 F.3d at 42-43. But where, as here, the record discloses no material facts, or material inferences that may permissibly be drawn from those facts, over which reasonable persons could differ, then the case is ripe for summary judgment. *Cent. Oil & Supply Corp. v. U.S.*, 557 F.2d 511, 515 (5th Cir. 1977) (citing *Poller v. Columbia Broad. Sys.*,

368 U.S. 464, 473 (1962); *Eutectic Corp. v. Astralloy-Vulcan Corp*., 510 F.2d 1111, 1115 (5th Cir. 1975)).

Therefore, there is no genuine dispute of material fact, and Complainant is entitled to a judgment as a matter of law that Respondent offered to perform, and performed, renovation in target housing without EPA certification under 40 C.F.R. § 745.89(a), in violation of 40 C.F.R. § 745.81(a)(2)(ii).

2. Respondent failed to ensure its employees were certified renovators or trained by certified renovators (COUNT TWO)

There is no dispute of material fact that Respondent failed to ensure its employees were certified renovators or trained by certified renovators, as required by 40 C.F.R. §§ 745.81(a)(3) and 745.85(a). Under 40 C.F.R. § 745.81(a)(3), all renovations must be directed by renovators certified in accordance with 40 C.F.R. § 745.90(a) and performed by certified renovators or individuals trained in accordance with 40 C.F.R. § 745.90(b)(2) in target housing or child occupied facilities. *See* 40 C.F.R. § 745.90(a) ("To become a certified renovator…an individual must successfully complete the appropriate course accredited by EPA under [40 C.F.R.] § 745.225 or by a State or Tribal program that is authorized under Subpart Q of this part."); 40 C.F.R. § 745.90(b)(2) ("Certified renovators are responsible for…provid[ing] training to workers on the work practices required by §745.85(a).").

Further, 40 C.F.R. § 745.85(a) provides that renovations must be performed by certified firms using certified renovators as directed in 40 C.F.R. § 745.89. 40 C.F.R. § 745.89(d)(1) provides that firms performing renovations must ensure that all individuals performing renovation activities on behalf of the firm are either certified renovators or have been trained by a certified renovator in accordance with 40 C.F.R. § 745.90. And 40 C.F.R. § 745.89(d)(2) provides that firms performing renovations must ensure that a certified renovator is assigned to

each renovation performed by the firm and discharges all the certified renovator responsibilities. *See also*, 40 C.F.R. § 745.86(a) ("Firms performing renovations must retain and, if requested, make available to EPA all records necessary to demonstrate compliance with this subpart…"); 40 C.F.R. § 745.86(b)(6)(i) (Records that must be retained include documentation "that the certified renovator provided on-the-job training for workers used on the project" and that "training was provided to workers.").

During the July 25, 2018 inspection, Respondent was actively performing a renovation on the Turnagain Property, which was being supervised by Mr. von Marees. CX 07. Ms. Farnham asked Mr. von Marees if he or any of his employees were certified renovators. CX 07, 04. Mr. von Marees responded that he was not a certified renovator. *Id*. Ms. Farnham asked Mr. von Marees whether he was able to provide documentation showing that his workers received training in work practice standards by a certified renovator. *Id*. Mr. von Marees responded that he was unable to provide such documentation. CX 07, 04. And Mr. von Marees was, in fact, not a certified renovator. *See* CX 12; *Supra,* Section V(B)(1).

Therefore, Respondent failed to ensure that its renovation of the Turnagain Property was directed by certified renovators and performed by certified renovators or appropriately trained individuals, in violation of 40 C.F.R. § 745.89(d). Respondent failed to ensure that all individuals performing renovation activities on behalf of the firm were either certified renovators or had been trained by a certified renovator in accordance with 40 C.F.R. § 745.90, in violation of 40 C.F.R. § 745.89(d)(1). Respondent also failed to ensure that a certified renovator is assigned to each renovation performed by the firm and discharges all the certified renovator responsibilities, in violation of 40 C.F.R. § 745.89(d)(2). Complaint, ¶¶ 4.7 to 4.19.

Beyond denying these allegations without any further support, *see* Answer, ¶¶4.7 to 4.19, Respondent offered no evidence to suggest that any of its employees were certified renovators or trained by certified renovators. *See generally*, RPHE. Respondent insinuated that Mr. von Marees is a certified renovator because he took training required by the State of Alaska, RPHE at 2, but Alaska is not authorized to carry out the Lead-Paint Program in lieu of EPA, 40 C.F.R. Part 745, Subpart Q. *See also, supra,* Section V(B)(1). Respondent produced no support for its assertion that Mr. von Marees is a certified renovator. And, even if it had, that support is immaterial because any requirements that Alaska places on Respondent are separate and distinct from any requirements that the RRP Rule places on Respondent. So, even if Mr. von Marees has completed an Alaska-accredited training course, if he did not also take an EPA-accredited training course, he was not a certified renovator, and therefore Respondent did not comply with the RRP Rule.

Therefore, there is no genuine issue of material fact as to whether Respondent failed to ensure its employees were certified renovators or trained by certified renovators. *See Anderson*, 477 U.S. at 248 (a factual dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Complainant is entitled to judgment as a matter of law that Respondent failed to ensure that a certified renovator was assigned to the Turnagain Property renovation, in violation of 40 C.F.R. § 745.89(d)(2), and failed to ensure that all individuals performing renovation activities on behalf of Respondent were either certified renovators or had been trained by a certified renovator, in violation of 40 C.F.R. § 745.89(d)(1).

3. Respondent failed to post warning signs (COUNT THREE)

There is no material dispute of fact that Respondent failed to post warning signs, in violation of 40 C.F.R. § 745.89(d)(3). Firms performing renovations must ensure that all

renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85. 40 C.F.R. § 745.89(d)(3). As established in Sections V(A) and V(C)(1), above, Respondent is a firm that was performing a renovation on the Turnagain Property during the July 25, 2018 inspection. CX 07; *Supra*, Sections V(A), V(C)(1).

Under 40 C.F.R. § 745.85(a)(1), 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. 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. *Id*.

During the July 25, 2018 inspection, Ms. Farnham and Mr. Hamlet noted that while Respondent was performing the renovation, there were no posted signs defining the work area or warning persons not involved in the renovation to remain outside of the work area. CX 07; CX 04 at 8; CX 05 at 7. During the inspection, Mr. Hamlet took pictures of the entire work area, beginning from the street and continuing up onto the Turnagain Property. CX 14-55. Notably absent from any of the photographs are any signs defining the work area or warning persons to remain outside of the work area. *See, e.g.*, CX 19-20 (photographs taken by Mr. Hamlet during the July 25, 2018 inspection, from the street in front of the Turnagain Property looking onto the front yard of the Turnagain Property); CX 25-31 (photographs taken by Mr. Hamlet during the July 25, 2018 inspection, from the property adjacent to the Turnagain Property looking onto the side of the Turnagain Property). And as Ms. Farnham and Mr. Hamlet described in their declarations, they were unable to locate any signs defining the work area or warning people not involved with the renovation to remain outside of the work area. CX 04 at 4-5, 8; CX 05 at 7.

A dispute is genuine, for summary judgment purposes, when the available evidence "is such that a reasonable jury could resolve the point in favor of the nonmoving party." *U.S. v. One Parcel of Real Property, Etc. (Great Harbor Neck, New Shoreham, R.I.)*, 960 F.2d 200, 204 (1st Cir. 1992). Here, other than simply denying this allegation, *see* Answer, ¶4.23, Respondent has put nothing in the record to suggest that it posted warning signs on the Turnagain Property. *See generally*, RPHE. Instead, the only evidence in the record shows that there were no warning signs posted defining the work area and warning occupants and other persons not involved in renovation activities to remain outside of the work area. CX 19-20, 25-31.

Therefore, there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law that Respondent failed to post warning signs, in violation of 40 C.F.R. § 745.85(a)(1), and failed to ensure that the renovation was performed in accordance with work practice standards, as required by 40 C.F.R. § 745.89(d)(3).

4. Respondent failed to cover the ground with impermeable materials or isolate the work area (COUNT FOUR)

There is no genuine dispute of material fact that Respondent failed to cover the ground with impermeable materials or isolate the work area, as required by 40 C.F.R. § 745.89(d)(3). Under 40 C.F.R. § 745.89(d)(3), firms performing renovations must ensure that all renovations performed by the firm are performed in accordance with the work practice standards in 40 C.F.R. § 745.85. As established in Sections V(A) and V(C)(1), above, Respondent is a firm that was performing a renovation on the Turnagain Property during the July 25, 2018 inspection. CX 07.

Before 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). 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). And 40 C.F.R. § 745.85(a)(2)(ii)(C) provides that, when performing exterior renovations, the firm must cover 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.

During the July 25, 2018 inspection, Ms. Farnham and Mr. Hamlet noted that while Respondent was performing the renovation, Respondent failed to isolate the work area to prevent dust or debris from leaving the work area, and failed to put down plastic sheeting or other disposable impermeable material covering the ground. CX 07; CX 04-05. Instead, Respondent allowed paint chips to be strewn on the bare ground throughout the work area. *See* CX 35-42, 46, 49 (photographs taken by Mr. Hamlet during the July 25, 2018 inspection, of the ground of the Turnagain Property depicting a lack of impermeable material on the ground and paint chips strewn about). *See also* CX 07; CX 04; CX 05 at 7.

During the inspection, while Ms. Farnham discussed the RRP Rule with Mr. von Marees, Mr. Hamlet walked around the majority of the Turnagain Property and closely observed its condition. Mr. Hamlet reported that "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…and paint chips were flying everywhere. There were paint chips all over the bare ground." CX 05 at 7.

A dispute is genuine, for summary judgment purposes, when "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." *One Parcel of Real Property*, 960 F.2d at 204. Here, other than simply denying this allegation, *see* Answer, ¶¶4.30, 4.31, Respondent put nothing in the record to suggest that it isolated the work

area or covered the ground with impermeable material. *See generally,* RPHE. Instead, the only evidence in the record shows that there was no isolation of the work area, the ground was not covered with impermeable material, and paint chips were allowed to be strewn all over the property. CX 35-42, 46, 49; CX 04, 05.

Therefore, there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law that Respondent failed to isolate the work area and failed to cover the ground with impermeable material while the renovation was being performed, in violation of 40 C.F.R. §§ 745.85(a)(2) and 745.85(a)(2)(ii)(C), and failed to ensure that the renovation was performed in accordance with work practice standards, as required by 40 C.F.R. § 745.89(d)(3). Complaint, ¶¶4.25 to 4.32.

VI. CONCLUSION

Respondent committed at least four different violations of TSCA and the RRP Rule during its renovation of the Turnagain Property, for which Complainant is entitled to judgment as a matter of law. The purpose of accelerated decision is to "pierce the pleadings and to assess the proof to see whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587. But where, as here, the record discloses no material facts, or material inferences that may permissibly be drawn from those facts, over which reasonable persons could differ, then the case is ripe for summary judgment. *Central Oil*, 557 F.2d at 515 (citing *Poller*, 368 U.S. at 473; *Eutectic Corp.*, 510 F.2d at 1115). When the record, taken as a whole, cannot lead a rational trier of fact to find for the nonmoving party, then there is no genuine issue for trial. *Ricci*, 557 U.S. 586.

Here, even if this Court were to assume that each of Respondent's arguments were true, Respondent would still have violated TSCA and the RRP Rule. "[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*, 477 U.S. at 248. Therefore, this Court should grant Complainant's motion for accelerated decision.

Respectfully submitted,

ANDREW FUTERMAN Digitally signed by ANDREW FUTERMAN Date: 2021.06.23 09:00:32 -07'00'

_____

Andrew Futerman
Counsel for Complainant
EPA Region 10

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Memorandum in Support of Motion for Accelerated Decision as to Liability**, dated June 23, 2021 was served on the following parties in manner indicated below:

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1200 Pennsylvania Avenue, NW
Washington DC 20004

Copy by Electronic Mail to:
Mr. and Mrs. Rodrigo and Kari von Marees
GreenBuild Design & Construction, LLC
rad@greenbuild.us.com
kad@greenbuild.us.com
For Respondent

Dated: June 23, 2021
Seattle, Washington

Respectfully submitted,

ANDREW FUTERMAN
Digitally signed by ANDREW FUTERMAN
Date: 2021.06.23 09:01:01 -07'00'

_____
Andrew Futerman
Counsel for Complainant
EPA Region 10