

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

BEFORE THE ADMINISTRATOR

In the Matter of:

LHP, LLC,

Respondent.

)
)
)
)
)

Docket. No. TSCA-07-2014-0029

COMPLAINANT’S MOTION TO COMPEL DISCOVERY

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice”), 40 C.F.R. §§ 22.16(a) and 22.19(f), Complainant, the United States Environmental Protection Agency, Region 7 (“EPA”), hereby requests that this court compel production of documents and information authenticating the renovation record submitted by Respondent as Proposed Group Exhibit RX14 in LHP, LLC’s Motion to Supplement Prehearing Exchange.¹

On February 19, 2015, Respondent LHP, LLC, filed LHP, LLC’s Motion to Supplement Prehearing Exchange (“R. Supp. PHE”). Included with this motion was a document marked as Proposed Group Exhibit RX14, purporting to be a “renovation Note Summary and Checklist that was in [LHP, LLC’s] files.” R. Supp. PHE at 2. Citing concerns as to the authenticity, reliability, and probative value of this document as evidence, the EPA requested in Complainant’s Response to LHP, LLC’s Motion to Supplement Prehearing Exchange (“C. Resp. R. Supp. PHE”) that Respondent provide authenticating and foundational information demonstrating that the record was, in fact, “created or produced by David Fiala at or near the

¹ Complainant received no response from Respondent stating its position on the filing of this motion.

time of EPA's November 9, 2012, inspection at 800 A Street in Lincoln, Nebraska." C. Resp. R. Supp. PHE at 2-3, 5. Because Respondent did not submit a reply to Complainant's response within the time allowed by the Rules of Practice,² and because Respondent has not otherwise provided such requested information,³ Complainant now files this motion seeking production of documents to authenticate the "renovation Note Summary and Checklist" offered as Proposed Group Exhibit RX14.

For this production, Complainant requests that LHP, LLC, provide the electronic files in which Proposed Group RX14 was originally written and/or created, including Microsoft Word, Adobe PDF, and/or any other word processing file formats. Complainant requests that these files be produced via CD or DVD, in native format, and with all original metadata intact, including, but not limited to, the date and time of creation, creator, and modifications to the document and all accompanying dates thereto. This information should come from the files of LHP, LLC, or its agents and representatives; David Fiala; and/or Delaney Law, PC, as received from LHP, LLC, or David Fiala.

As electronic files, such documents and information could, with relative ease, be located by Respondent and/or Respondent's counsel and transmitted to Complainant. Production of the information requested in this motion, therefore, will not unreasonably delay this proceeding nor unreasonably burden Respondent. Furthermore, as the creator, custodian, and offeror of this document, LHP, LLC, maintains exclusive access to original electronic files underlying

² "The movant's reply to any written response [to a motion] must be filed within 10 days after service of such response and shall be limited to issues raised in the response." 40 C.F.R. § 22.16(b); *see also* 40 C.F.R. § 22.67(a) (including Saturdays and Sundays in computation of periods allowed by the Rules of Practice). Complainant served Respondent with its response to LHP, LLC's Motion to Supplement Prehearing Exchange on February 29, 2016, and Respondent's period for reply ended on March 10, 2016.

³ Due to the possible legal and ethical consequences of Respondent's reliance upon Proposed Group Exhibit RX14 at trial, EPA counsel made a separate out-of-court request for production. *See* Attachment 1, Letter from Anne Rauch to Cynthia Rote, Mar. 7, 2016 (reiterating EPA's request for authenticating documents and noting the ethical and legal concerns raised by Respondent's presentation of Proposed Group Exhibit RX14 in this proceeding).

Proposed Group Exhibit RX14 and possesses sole knowledge as to the circumstances of this document's creation. Additionally, as counsel to Respondent and preparer of LHP, LLC's Motion to Supplement Prehearing Exchange, Delaney Law, PC, presumably has in its possession the individual PDF, Microsoft Word, or other word processing file that was provided by LHP, LLC, and subsequently consolidated into the attachment of exhibits accompanying Respondent's submission to the court.

For these reasons, Complainant respectfully requests that this court grant the instant motion to compel discovery of the documents and information described above.

RESPECTFULLY SUBMITTED,
this 11th day of March, 2016,



Anne Rauch
Assistant Regional Counsel