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

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
LHP, LLC,	)	**Docket. No. TSCA-07-2014-0029**
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Comes now Complainant United States Environmental Protection Agency, Region 7, and respectfully submits its Response to Respondent LHP, LLC's Motion for Accelerated Decision, stating as follows:

I. INTRODUCTION

On November 23, 2015, the Office of Administrative Law Judges file stamped its receipt of LHP, LLC's motion seeking summary judgment ruling against the United States Environmental Protection Agency, Region 7. Respondent's certificate of service shows the motion was sent to Complainant on November 20, 2015, via Federal Express, which is a commercial delivery service. Complainant received Respondent's motion from Federal Express with service designated "FedEx 2Day," on November 24, 2015. Respondent's motion is unsupported by the facts of this case and contrary to relevant law. Therefore, Respondent's motion must be denied.

II. STANDARD OF REVIEW

Section 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice) provides for both motions to dismiss and motions for accelerated decision.[1] Respondent styled its pleading as a motion for summary judgment, citing the standard for a motion for summary judgment under Federal Rule of Civil Procedure 56 and presenting as support for its motion matters outside of the pleadings.[2] Accordingly, the discussion below addresses Respondent's motion under the standard set forth in the Rules of Practice for a motion for accelerated decision.

A. Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) provides as follows:

> 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 he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.[3]

Because "[m]otions for accelerated decision and dismissal under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure,"[4] the Office of Administrative Law Judges and the Environmental Appeals Board has consistently

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[1] 40 C.F.R. § 22.20 (2015).

[2] *See* In re BWX Techs., Inc., 9 E.A.D. 61, 74 (EAB 2000) ("Both parties' motions were supported by affidavits; therefore, the motions may be characterized as cross-motions for an accelerated decision, analogous to the practice prescribed by Rule 12(b) of the Federal Rules of Civil Procedure, which states that 'if, on a motion, . . . to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented and not excluded by the court, the motion shall be treated as one for summary judgment [as provided in Rule 56 of the Federal Rules] . . . .'").

[3] 40 C.F.R. § 22.20(a).

[4] In re Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS 28, *6.

relied upon summary judgment case law when adjudicating motions for accelerated decision under the Rules of Practice.[5] 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."[6] A factual dispute is material for summary judgment where, under the governing substantive law, it might affect the outcome of the proceeding.[7] A factual dispute is genuine if a reasonable finder of fact could return a verdict in favor of the nonmoving party under the applicable evidentiary standard of proof for that proceeding.[8] In all cases concerning the administrative assessment of a civil penalty under the Rules of Practice, the evidentiary standard of proof is a "preponderance of the evidence."[9]

Motions for summary judgment are properly analyzed in a two-step fashion. First, the party moving for summary judgment bears the initial burden of showing the absence of a

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[5] *See, e.g.*, Wego Chem. & Mineral Corp., 4 E.A.D. 513, 519 n. 10 (EAB Feb. 24, 1993) ("The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice."); In re Special Interest Auto Works, Inc., and Troy Peterson, No. CWA-10-2013-0123, slip op. at 4 (OALJ Oct, 13, 2015); In re Spring Crest Fuel Co., Inc., 2000 EPA ALJ LEXIS 55, *12 (citing In re CWM Chem. Servs., Inc., 6 E.A.D. 1, 12 (EAB 1995)).

[6] FED. R. CIV. P. 56(a) (2014).

[7] Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS at *7; Special Interest Auto Works, No. CWA-10-2013-0123, slip op. at 5-6 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)) ("The governing substantive law determines which facts are material for summary judgment . . . .").

[8] Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS at *7-9 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

[9] 40 C.F.R. § 22.24(b) ("Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence."). The Environmental Appeals Board has interpreted the "preponderance of the evidence" standard, as provided for in 40 C.F.R. §22.24, "to mean that a reasonable person would find 'a contested fact more probably true than untrue.'" In re Swing-a-Way Mfg. Co., 5 E.A.D. 742, 748 (EAB 1995) (quoting Sanders v. U.S. Postal Serv., 801 F.2d 1238, 1330 (Fed. Cir. 1986)).

genuine issue as to any material fact.[10] Rule 56(c)(1) requires that such a showing be supported by:

> (A) citing to particular parts of materials in the record, including deposition, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admission, interrogatory answers, or other materials; or
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> (B) 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.[11]

When an affidavit or declaration is used to support a motion, it "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[12] Further, the evidentiary material proffered by the moving party pursuant to this rule must be viewed in the light most favorable to the nonmoving party,[13] and in rendering her decision, the judge must draw all reasonable inferences from the evidentiary material in favor of the party opposing the motion.[14] "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence."[15]

Second, only once the party moving for summary judgment carries its burden of showing the absence of genuine issues of material fact is the opposing party required to offer any countering evidentiary material.[16] When the moving party properly supports its motion for

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[10] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970).

[11] FED. R. CIV. P. 56(c)(1)(A)-(B).

[12] FED. R. CIV. P. 56(c)(4).

[13] Anderson, 477 U.S. at 248; Adickes, 398 U.S. at 157.

[14] Anderson, 477 U.S. at 255; Adickes, 398 U.S. at 158-59.

[15] Rogers Corp. v. EPA, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

[16] *See* In re BWX Techs., Inc., 9 E.A.D. 61, 76 (EAB 2000) ("Once this showing has been made, the burden of production shifts to the nonmovant having the burden of persuasion."); In re Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS 28, *8-*9 (citing Adickes v. S. H. Kress &

summary judgment, the nonmoving party must demonstrate the existence of a genuine issue of material fact by presenting "significant probative evidence tending to support" its pleadings.[17] "[T]he evidence must be substantial and probative in light of the appropriate evidentiary standard of the case."[18] However,

> [i]n considering whether a nonmovant has met this standard, courts are not supposed to engage in the jury function of determining credibility or weighing facts; instead, courts are to view the record in the case and submissions in the light most favorable to the nonmovant (including the nonmovant who bears the burden of persuasion on an issue), and are to believe all evidence offered by it.[19]

B. Governing Substantive Law

Title X of the Housing and Community Development Act of 1992 amended the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692, to add Subchapter IV to TSCA, entitled "Lead Exposure Reduction."[20] The purpose of Congress' amendment was "to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing" and "encourage effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction . . . ."[21]

Pursuant to Section 402(c)(3) of TSCA, 15 U.S.C. §2682(c)(3), EPA promulgated regulations amending Subparts E and L of 40 C.F.R. Part 745 "to address lead-based paint hazards created by renovation, repair, and painting activities that disturb lead-based paint in

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Co., 398 U.S. 144, 156 (1970)) ("[I]f the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required.").

[17] Anderson, 477 U.S. at 256.

[18] BWX Techs., Inc., 9 E.A.D. at 76.

[19] Id.

[20] Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021, 106 Stat. 3672, 3912-3924 (1992).

[21] §1003(1) and (3), 106 Stat. at 3897-98.

target housing and child-occupied facilities."[22] These regulations, known collectively as the Renovation, Repair, and Painting Rule, "appl[y] to all renovations performed for compensation in target housing and child-occupied facilities,"[23] with certain exceptions not applicable to this case.[24] Section 401(17) of TSCA, 15 U.S.C. § 2681(17), defines "target housing" as "any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing for the elderly or persons with disabilities) or any 0-bedroom dwelling." A "child-occupied facility" is defined at 40 C.F.R. § 745.83 as "a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, under 6 years of age, on at least two different days within any week . . . ." The regulation at 40 C.F.R. § 745.83 also defines "renovation" as "the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces . . . ." More specifically,

> [t]he term 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 activities that may generate paint dust)).[25]

Lastly, for the purposes of this regulation, "compensation includes pay for work performed, such as that paid to contractors and subcontractors; wages, such as those paid to employees of

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[22] Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692, 21692 (Apr. 22, 2008) (to be codified at 40 C.F.R. pt. 745).

[23] 40 C.F.R. § 745.80 (2015).

[24] *See* Id. § 745.82(a)(1)-(3) (excluding from coverage renovations of building components determined to be free of lead-based paint by a certified inspector or risk assessor, or by a certified renovator using an EPA-approved test kit).

[25] Id. § 745.83. "Painted surface" is defined as "a component surface covered in whole or in part with paint or other surface coatings." A "component" or "building component" means "specific design or structural elements or fixtures of a building or residential dwelling that are distinguished from each other by form, function, and location." Id.

contractors, building owners, [and] property management companies . . . ; and rent for target housing or public or commercial building space."[26]

The Renovation, Repair, and Painting Rule contains a number of work practice standards that must be followed during and after every covered renovation in target housing and child-occupied facilities. These standards are concentrated in 40 C.F.R. § 745.85 and require, as relevant to this case, that a firm performing renovations:

- "post signs clearly defining the work area and warning occupants and other persons not involved in the 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."[27]

- "[c]lose all doors and windows within 20 feet of the renovation."[28]

- "[e]nsure that doors within the work area that will be used while the job is being performed are covered with plastic sheeting or other impermeable material in a manner that allows workers to pass through while confining dust and debris to the work area."[29]

- "[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."[30]

- "[contain waste from renovation activities] to prevent releases of dust and debris before the waste is removed from the work area for storage or disposal."[31]

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[26] Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. at 21707. Concerning receipt of rent as "compensation," the EPA has explained that "[a]lthough the owner of rental property may not be compensated for work at the time that the work is performed, tenants generally pay rent for the right to occupy a rental space as well as for maintenance services in that space. Thus, renovations performed by renovation contractors and their employees in target housing or child-occupied facilities are covered, as are renovations by owners of rental target housing or child-occupied facilities . . . ." Id. at 21707-08.

[27] 40 C.F.R. § 745.85(a)(1).

[28] Id. § 745.85(a)(2)(ii)(A).

[29] Id. § 745.85(a)(2)(ii)(B).

[30] Id. § 745.85(a)(2)(ii)(C).

[31] Id. § 745.85(a)(4)(i).

The regulation at 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."

Finally, Section 409 of TSCA, 15 U.S.C. § 2689, states that "[i]t shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with any rule or order issued under [Subchapter IV—Lead Exposure Reduction]." A "person" is defined at 40 C.F.R. §745.83, in pertinent part, as "any natural or judicial person including any individual, corporation, partnership, or association . . . ."

III. ARGUMENT

A. LHP Has Not Brought Forth Sufficient Information to Establish the Absence of Genuine Issues of Material Fact in this Case.

As the movant for accelerated decision, Respondent bears the initial burden of production and must make out a case for presumptive entitlement to summary judgment in its favor. As stated in the Rules of Practice and applied by previous tribunals, Respondent must inform the Presiding Officer of the basis for its motion and identify materials in the record or other additional evidence that demonstrates the absence of a genuine issue of material fact. Here, Respondent has failed to establish the absence of genuine issues of material fact, therefore its motion for accelerated decision should be denied.

Respondent's primary contention in seeking accelerated decision is that no regulated "renovation" activities were occurring at the work site in question on November 9, 2012.[32] As support for this legal conclusion, Respondent argues at least three separate assertions of fact. First, Respondent states that the workers present at the property on November 9, 2012, were

[32] *See* Resp't Mot. for Summ. J., pp. 4-5; Aff. of David Fiala, pp. 1 ("On November 9, 2012, there was no scraping being done at 800 A Street.").

touching up painted surfaces and in the process of cleaning up the work site following regulated activities that had occurred on previous days.[33] Second, Respondent argues that the concrete foundation of the home was unpainted concrete that did not need to be scraped.[34] Third, Respondent claims that there were paint chips present on the grounds of the property at the time LHP acquired the property.[35]

Concerning Respondent's first argument, Respondent provides no evidence to support its contention that LHP's workers were engaged exclusively in non-regulated activities at the time of the inspection. Even assuming that LHP's workers did, in fact, touch up paint and pick up debris at 800 A Street on November 9, 2012, it is fallacious reasoning to conclude that other activities, particularly regulated activities, did not occur on the property on the date and at the time of the inspection. Respondent's motion admits that Mr. Fiala was not present during the inspection.[36] As such, Group Exhibit A—the affidavit of Mr. Fiala—and Group Exhibit B—a collection of materials that is unsigned and unsworn—is not probative of the activities that occurred during the inspection. Respondent's statement alone, unsupported by further proof, does not establish the absence of a genuine dispute as to whether regulated renovation activities occurred at the property on the date and at the time of the inspection.

Second, Respondent's argument that the foundation of the home was unpainted concrete is based only on a low-quality photocopied reproduction of a photograph.[37] It is impossible for

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[33] Resp't Mot. for Summ. J., pp. 4-5; Aff. of David Fiala, paras. 4-5, 9.

[34] Resp't Mot. for Summ. J., pp. 5; Aff. of David Fiala, para. 8.

[35] Resp't Mot. for Summ. J., pp. 4; Aff. of David Fiala, para. 3, 5.

[36] Resp't Mot. for Summ. J., p. 2 ("When Mr. Fiala arrived, Mr. Clark had already completed his inspection.").

[37] *See* Resp't Mot. for Summ. J., Group Ex. B, p. 2. Complainant's counsel requested a photograph of better quality from Respondent's counsel on November 30, 2015. As of the date of this response, a higher-quality photograph has not been provided.

impossible for Complainant to determine the accuracy of Respondent's statement based on the photocopy provided, and Respondent proffers no further evidence to support the claim. Additionally, the fact of the foundation being painted or unpainted neither proves nor disproves that regulated renovation activities occurred on the property. It is entirely possible, in spite of Respondent's allegation, that regulated renovation activities were performed on other components of the property.

Lastly, Respondent's claim that paint chips were present on the grounds of the property at the time of LHP's purchase in June 2012 does not prove that regulated renovation activities were not occurring on November 9, 2012. Neither TSCA nor the Renovation, Repair, and Painting Rule requires Complainant to prove that renovation activities produced lead-contaminated dust or debris. Even assuming, then, that normal weathering caused paint chips to settle on the surrounding grounds of the property, this fact would merely tend to show that preexisting paint chips contributed to the widespread contamination that EPA's inspector documented during his inspection—not that regulated activities did not occur on the date of inspection.

Despite Respondent's allegations, Respondent has not demonstrated the absence of a genuine issues of material fact in this case. Respondent's arguments for accelerated decision include allegations of fact that either find no basis in the evidence or lead to illogical and irrelevant conclusions. Each of Respondent's claims, even if true, establishes only the fact of the assertion itself; they do not establish that regulated activities did not occur on the date of inspection. Respondent, therefore, has not met its burden of showing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Therefore, Respondent's motion for accelerated decision should be denied.

B. Complainant's Prehearing Information Exchange Presents Affirmative Evidence that a Genuine Issue of Material Fact Exists in this Case.

If Respondent is found to have successfully demonstrated the absence of a genuine dispute as to material fact, the burden of production shifts to Complainant to present evidence of the existence of such a dispute. In this case, questions of material fact remain to be decided by this tribunal, highlighted by the factual assertions made by Respondent in its motion for accelerated decision. As discussed above, the primary factual dispute concerns whether regulated "renovation" activities were occurring at the property in question on November 9, 2012. As an issue central to the applicability of the Renovation, Repair, and Painting Rule, the performance or nonperformance of regulated renovation activities on the property is a material issue in this case.[38] Furthermore, this dispute is genuine because a Presiding Officer—based on the information below—could find in the Complainant's favor by a preponderance of the evidence.

In its Complaint, Complainant alleged that LHP, LLC, was engaged in a "renovation for compensation" at 800 A Street in Lincoln, Nebraska, on November 9, 2012.[39] As provided in the regulation and alleged in the Complaint, "renovation" is defined to mean "modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces," including the "modification of painted doors, surface restoration, window repair, [or] surface preparation activity (such as sanding, scraping, or other such activities that may generate paint dust) . . . ."[40]

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[38] *See* 40 C.F.R. § 745.82 (2015) (noting the applicability of the Renovation, Repair, and Painting Rule to "all renovations performed for compensation in target housing and child-occupied facilities").

[39] Compl., p. 6.

[40] 40 C.F.R. § 745.83; Compl., p. 3.

Complainant presented in its Prehearing Information Exchange substantial, probative evidence tending to demonstrate that Respondent was engaged in regulated renovation activities on the date of inspection. Notably, Complainant's Prehearing Information Exchange contains the signed inspection report prepared by EPA's inspector, Paul Clark, who attests that he witnessed workers scraping paint from the house located at 800 A Street, in Lincoln, Nebraska.[41] The inspection report is a record of a regularly conducted activity and therefore qualifies as an exception to the rule against hearsay under Federal Rule of Evidence 803.[42] Rule 803 proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.[43]

Specifically, EPA's inspector observed workers scraping paint from the base of the West side of the house and from a window at the Southwest corner of the West side of the house.[44] Furthermore, the inspection report documents that the on-site crew leader, Mr. Mynor Herrera, admitted that he had instructed his workers to scrape paint on the home on the date of the inspection.[45] He explained to Mr. Clark that he instructed them to scrape the paint after noticing that the old paint was peeling off under the new paint that his workers had applied on a previous work day.[46] Complainant also proffered extensive photographic evidence documenting the work

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[41] CX 1, p. 6.

[42] *See* FED. R. EVID. 803(6) (2014).

[43] FED R. EVID. 803 advisory committee's note ("The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.").

[44] Id.

[45] Id.

[46] Id.

site as it appeared to Mr. Clark during his inspection on November 9, 2012.[47] The photographs accompanying Mr. Clark's inspection report corroborate his statement that workers were engaged in scraping paint on the date and time of the inspection.[48]

The certified statements contained in Mr. Clark's inspection report together with the accompanying photographic documentation presents "significant probative evidence tending to support" Complainant's pleadings.[49] Respondent asserted in its motion that no renovation activities occurred at the property in question during the day of the inspection, relying merely on factual assertions that are both unsupported by evidence and upon which Respondent fallaciously concludes that there is no genuine dispute of material fact.[50] Complainant, on the other hand, has offered in its Prehearing Information Exchange affirmative evidence—in the form of a certified inspector's report and photographic evidence—that regulated scraping activities were performed on the property on the date of the inspection.[51] Complainant, therefore, has demonstrated the existence of a genuine dispute of material fact by proffering "significant probative evidence from which a reasonable presiding officer could find in [Complainant's] favor by a preponderance of the evidence."[52]

IV. CONCLUSION

Respondent, as the party moving for accelerated decision, bears the initial burden of showing the absence of a genuine dispute as to any material fact.[53] Only if Respondent meets

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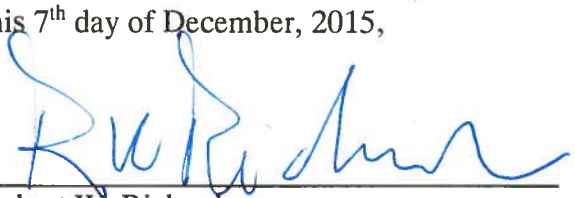
[47] CX 3-41.
[48] CX 8.
[49] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).
[50] *See* discussion *supra* Part III.A.
[51] *See* discussion *supra* Part III.B.
[52] In re Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS 28, *15.
[53] Anderson, 477 U.S. at 248; Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970).

this burden is Complainant required to offer any countering evidentiary material.[54] In this case, Respondent claims that regulated renovation activities did not occur on the date of inspection. However, the information Respondent presents to support this contention does not demonstrate that this is incontrovertibly the case. Accordingly, a genuine dispute of material fact remains, and Respondent's motion should be denied. Alternatively, Complainants Prehearing Information Exchange presents affirmative evidence that Respondent's workers were, in fact, performing regulated paint-scraping activities on the date of EPA's inspection. There is, therefore, a genuine dispute of material fact and the Presiding Officer should deny Respondent's Motion for Accelerated Decision.

RESPECTFULLY SUBMITTED,
this 7th day of December, 2015,



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[54] *See* In re BWX Techs., Inc., 9 E.A.D. 61, 76 (EAB 2000); Coast Wood Preserving, Inc., 2001 EPA ALJ LEXIS at *8-*9 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 156 (1970)).

In the Matter of LHP, LLC., Respondent
Docket No. TSCA-07-2014-0029

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Respondent's Motion for Summary Judgment was sent this 7th day of December, 2015, in the following manner to the addressees listed below.

Milady Peters
Paralegal

By OALJ E-Filing System:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges

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