

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
)	
LHP, LLC)	
130 N. 27 TH Street, #6)	Docket No. TSCA-07-2014-0029
Lincoln, Nebraska)	
)	
Respondent)	

**LHP, LLC'S
PRETRIAL BRIEF**

NOW COMES, Respondent, LHP, LLC. ("LHP") by and through its undersigned attorneys, presents the following Pretrial Brief.

I. Factual Background

1. In June of 2012, LHP, LLC purchased a home at 800 A Street in Nebraska (the "Property"). On November 6 through 8, 2012, LHP performed a renovation project on the Property. See Joint Set of Stipulated Facts, Exhibits, and Testimony ¶ 6. This included repainting the home and having it treated for termites. Prior to purchasing the home, LHP decided to put off cleaning up the debris and paint chips that had accumulated around the outside of the home until after renovations were complete.

2. On November 9, 2012, EPA inspector Clark arrived at the home to perform an inspection (the "Inspection"). He spoke with Mynor Herrera, a Maintenance Crew Leader with LHP. Mr. Herrera explained that LHP was performing cleanup and final touchup work at the property in anticipation of renting it out.

3. Inspector Clark requested Mr. Herrera sign two documents, misrepresenting what they were. Mr. Herrera showed Mr. Clark the Certified Renovator and Certified Firm Certificates.

4. Mr. Clark then contacted Mr. David Fiala, the owner of LHP. Mr. Fiala informed Mr. Clark that he would be arriving at the home shortly and asked for him not to bother the staff unless it was absolutely necessary.

5. When Mr. Fiala arrived, Mr. Clark had already completed his inspection. Mr. Clark never reviewed the inspection with Mr. Fiala or Mr. Herrera.

6. During all times referenced in the Complaint, LHP was a firm as defined in 40 C.F.R. 745.83.

7. On November 3, 2015, LHP requested information regarding the inspection and subsequent EPA action via the Freedom of Information Act (“FOIA”).

8. On January 8, 2016, the EPA responded to the FOIA request. The EPA provided documents but did withhold some information, citing 5 U.S.C. §§ 522(b)(5) and attaching a privilege log.

9. One set of FOIA documents produced shows that a company named A-Team Pest Control (“A-Team”) was at the Property on November 8, 2012, the day before the Inspection. Those documents contained a memorandum drafted by the owner of A-Team who states that he noticed plastic and caution state on the Property on November 8, 2012. He also pointed out that he accidentally got dirt on the house and told the workers on site in the event they wanted to apply touchup paint.

II. Procedural Background

10. On May 29, 2014, the EPA initiated a proceeding for the assessment of a civil penalty by filing the formal Complaint. The EPA charged LHP for allegedly failing to comply with the regulatory requirements of 40 C.F.R Part 745 and proposed a total civil penalty of Twenty-Six Thousand Eight Hundred and Forty Dollars (\$24,840) for the alleged violations.

11. The Complaint contained the following five (5) counts. Please note that LHP has added emphasis to wording in each count because the fundamental disagreement between the parties is whether LHP was engaged in renovation or renovation activities on the date of the Inspection:

- a. Failure to post signs or maintain signs in a place clearly defining the work area and warning occupants and other persons not involved in the *renovation activities* to remain outside of the work area in violation of Section 409 of TSCA, 15 U.S.C. § 2689 (emphasis added).
- b. Failure to close all doors and windows within 20 feet of the *renovation* in violation of 40 C.F.R. § 745.85(a)(2)(ii)(A) and 409 of TSCA, 15 U.S.C. § 2689 (emphasis added).
- c. Failure to ensure that doors within the work area being used *while the job was being performed* were covered with plastic sheeting or other impermeable material in violation of 409 TSCA, 15 U.S.C. § 2689 (emphasis added).
- d. Failure to 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 in violation of 40 C.F.R. §745.85(a)(2)(ii)(C) and 409 of TSCA, 15 U.S.C. § 2689 (emphasis added).
- e. Failure to contain waste from *renovation activities* and failure to prevent the release of dust and debris before the waste was removed from the work area for storage or disposal in violation of §745.85(a)(4)(i) and 409 of TSCA, 15 U.S.C. § 2689 (emphasis added).

12. On March 23, 2015, LHP filed an answer denying each count of the complaint and requesting that the Complaint to be dismissed with prejudice.

13. On April 10, 2015, at the request of the involved parties, an Order initiating Alternative Dispute Resolution was entered. The process was extended for an additional month and the parties subsequently entered into negotiations in July to settle the matter, and even got as far as to draft a Consent Agreement and Final Order on two separate occasions. However, due to an inability to reach an agreement, the Complainant moved forward with the proceedings.

14. On September 3, 2015 the Complainant's Initial Prehearing Exchange was filed. The Prehearing Exchange laid out the witnesses intended to be called and other important information from the Complainant's case.

15. On September 25, the Respondent filed Respondent's Initial Prehearing Exchange. The Prehearing Exchange laid out the potential witnesses to be called and factual information the respondent felt to be relevant to the claim at issue.

16. On October 8, 2015, the Complainant's Rebuttal to the Prehearing Exchange was filed. The rebuttal described the expected testimony of Ms. Candace Bednar and an attachment of her curriculum vitae.

ARGUMENT

I. LHP was not Engaged in Renovation or Renovation Activities on the Date of the Inspection.

The Renovation, Repair, and Painting Rule ("RRP") requires renovation companies to be registered and follow lead-safe work practices while doing "Renovation" as defined by 40 CFR Part 745. According to the RRP, "Renovations must be performed by certified firms using certified renovators as directed in §745.89." "Renovation" or "Renovation Activity" means the modification of any existing structure, or portion of an existing structure, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement, but does not include "minor repair and maintenance activities." Renovation activities are defined as:

- (A) Removal, Modification, or repairs of painted surfaces or painted components, modification of painted doors, surface restoration, window repair, surface preparation activity includes sanding, scraping, or other similar activities having the potential of generating paint dust. § 745.83.

Minor Repair and Maintenance Activities are defined as:

[A]ctivities, including minor heating, ventilation or air conditioning work, electrical work, and plumbing that disrupt 6 square feet or less of painted surface

per room for interior activities or 20 square feet or less of painted surface for exterior activities where none of the work practices prohibited or restricted by § 745.85(a)(3) are used and where the work does not involve window replacement or demolition of painted surface areas. When removing painted components, or portions of painted components, the entire surface area removed is the amount of painted surface disturbed. *Id.*

In order for the affirmative requirements of the RRP to apply, Mr. Clark would have had to observe certain activities on November 9, 2012. First, there must have been Renovation Activities occurring at the Property. Mr. Clark claims that there was “scraping,” however, outside of his accusation, there is no evidence to support this claim in accordance with EPA regulations like the RRP. Indeed, Mr. Clark failed to indicate how many square feet of exterior surfaces that LHP allegedly disrupted. Since Mr. Clark can and could not show that LHP disrupted 20 square feet of exterior surfaces during his visit, LHP’s work cannot be classified as Renovation Activities and instead must be viewed as Minor Repair and Maintenance Activities in accordance with the RRP and Section 745 generally.

Mr. Clark also omitted pertinent facts in his report. Most notably, Mr. Clark failed to convey the fact that LHP was in the process of cleaning up a property that it acquired in a state of disarray. Instead, Mr. Clark represented the pictures he submitted with his report as evidence that LHP violated EPA regulations. This representation ultimately caused the photographs and information he submitted to be viewed in a negative light and harmful to LHP. Indeed, Mr. Clark did not submit any evidence that LHP was engaged in Renovation as it is defined by the RRP. In his report, Mr. Clark merely states that he observed two workers scraping an unspecified amount of paint and was subsequently informed that they were putting the final touches on work that was performed on prior days when the affirmative requirements of the RRP were observed.

Mr. Clark’s report is disingenuous because it suggests that LHP should have been following RRP and other relevant protocol at the time of inspection. However, in a situation where there are

no ongoing Renovation Activities, different guidelines apply. While all parties agree that there was debris and paint scrapings on the ground surrounding the home, without the EPA having any argument as to when or how they came to be, the facts presented by the EPA can only show that LHP was engaged in Minor Repair and Maintenance Activities

LHP has not violated any EPA rules or regulations because LHP was not engaged in Renovation or Renovation Activities at the time of the Inspection when Mr. Clark made his observations. As aforementioned, Renovation or Renovation Activity means the modification of any existing structure or portion of an existing structure that results in the disturbance of painted surfaces, unless the activity is performed as party of an abatement, but does not include “minor repair and maintenance activities.” There is simply no evidence that tends to show that LHP was engaged in anything more than Minor Repair and Maintenance Activities because nothing indicates that LHP scraped anywhere near twenty (20) square feet of paint on September 9, 2012.

In order for there to have been a violation, LHP must have been involved in Renovation activities. Without that premise, the EPA has no case. None of the pictures in the report show anyone scraping paint. In fact, Mr. Fiala has provided pictures which shows the relevant portion of the house before the November 9, 2012 inspection; that picture depicts the relevant portion as grey concrete blocks void of any paint. The picture that the EPA took on November 9, 2012 shows the same portion as completely white with crew members working to apply the final coat of paint.

Respectfully Submitted,

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