



Via Electronic Submission

August 6, 2010

Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460-0001

Subject: Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program, Docket # EPA –HQ-OPPT-2005-0049

Dear Administrator Jackson:

On behalf of the Window and Door Manufacturers Association (WDMA), we respectfully submit the following comments on the EPA Notice of Proposed Rulemaking for Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program published in the *Federal Register* (Volume 75, No. 87) on May 6, 2010.

WDMA is a national trade association representing the leading U.S. producers of commercial and residential doors, windows, and skylights for domestic and export markets. Members sell to distributors, dealers, builders, remodelers, homeowners, architects, contractors, and other specifiers in residential, commercial, and institutional markets. WDMA members manufacture high quality products designed and constructed to performance-based standards that provide for improved safety, comfort, and energy efficiency, *especially* in the renovation of older homes and residential buildings.

The *Lead: Renovation, Repair and Painting Program* (LRRP) rule and any amendment of it therefore has a profound impact not only on our member companies that produce windows, doors and skylights, or own or provide product installation services, but for their customers as well which include remodelers, renovation firms, window and door dealers, and of course homeowners.

WDMA fully supports the intent of the *Residential Lead-Based Paint Hazard Reduction Act of 1992* (the Act) and shares EPA's concern for protecting children and women who are pregnant from lead hazards. We therefore also support practical, well substantiated and cost effective requirements to ensure that proper protective measures are taken when the homes that they occupy are improved through renovations or repairs. We

believe that EPA established adequate measures for accomplishing that objective in accordance with the Act by instituting the original *Lead; Renovation, Repair, and Painting Program* rule as published in the *Federal Register* on April 22, 2008, without the need for further expansion of the scope of the rule or the requirements it mandates.

From that standpoint, we are still greatly troubled by EPA's decision to remove the "opt-out" provisions from the original LRRP rule because we believe the Agency has not adequately justified doing so as expressed in previous comments submitted to EPA by WDMA on the matter, and in meetings WDMA has had with the White House Office of Management and Budget and members of Congress. We are now equally troubled by EPA's intent to mandate even more onerous dust wipe and clearance testing requirements detailed in the subject proposed rule. Once again we believe that such action is without adequate justification and without a proper understanding of the potential unintended negative impacts it may have.

Furthermore, we believe that EPA must assess the status and impact of the implementation of the current requirements before it can reasonably determine what additional, more onerous amendments to the rule may be warranted, if any. We believe this further assessment is an absolutely necessary step for EPA to take in order for the Agency to gain a sound understanding of the true costs of the rule in relation to the benefit it is providing, as well as the unintended impacts that may be emerging as a result, one being the discouragement or impediment of renovations in any home constructed before 1978 because of the greatly increased costs. That impact stands to significantly counter efforts by other existing federal, state, and private sector voluntary programs that are attempting to encourage homeowners to perform energy efficient renovations of their homes in the interest of energy conservation and reduction of the production of green house gases – two extremely important public welfare issues that to this point have been largely ignored in relation to implementation of this rule.

In a similar concern, our members report that the actual cost of window replacement in homes covered by the rule ranges from \$90-\$170 per window opening, far greater than the average \$35 per job originally and erroneously estimated by EPA. That cost will increase exponentially if the proposed additional clearance testing requirements are mandated. We believe that in turn, the professional renovation of pre-1978 homes in compliance with the requirements will be discouraged further, forcing homeowners to perform the work on their own or unknowingly hire contractors who are willing to ignore the law.

In fact, disturbing feedback we are now receiving from our manufacturer members and their renovator/dealer customers certified to perform covered renovations indicates consumers are still largely unaware of the rule, its requirements, or the perceived benefit. As a result, we understand consumers are in some cases opting for firms or contractors that are not certified and are ignoring the required work place practices in order to avoid the significant added costs. Conversely, we are also receiving feedback that some homeowners are having difficulty or are unable to find renovators who are

willing to do the work because of the onerous nature of the requirements and liability that results.

We are also greatly concerned by the continued non-existence of pre-renovation test kits that are compliant with EPA's test kit requirements under the rule. It is alarmingly clear that there will be no compliant kits in the near future based on the preliminary results of EPA's testing of available kits under its Environmental Technology Verification Program (ETV) as announced by EPA on July 27. Given EPA's assertion of its expectation that compliant kits would be available by September 2010 when it implemented the initial rule, and given the fact that this expectation is a significant part of the basis for the conclusions drawn by EPA's economic analysis of the rule, we believe that the absence of compliant kits must weigh heavily in EPA's consideration of additional regulations, and is also sound reasoning for the Agency to reassess its economic analysis and current implementation of the rule which we strongly urge the Agency to do. Forcing homeowners to incur significant additional costs for renovation work practices that are not required, unnecessary, and provide little to no benefit to them or anyone else, is simply wrong.

For these reasons alone, we believe that any action by EPA to further expand the requirements of the rule before more adequately assessing the state of the current rule and the impact it is having (both positive and negative) is premature. That said, we have four additional overarching reasons for objecting to the subject proposed rule based on concerns that are shared and have been expressed to EPA by a number of other interests. We include them here for added emphasis of our support for them. Specifically:

- EPA Lacks the Authority Under the Toxic Substances Control Act to Impose Dust Wipe Testing or Clearance Requirements on Renovators
- EPA's Proposed Requirements Are Inconsistent With the Statute Because They Eliminate the Distinction Between Abatement and Renovation
- EPA's Proposed Imposition of Dust Wipe Testing and Clearance Requirements is Arbitrary and Capricious
- EPA's Refusal to Convene a New Small Business Advocacy Review Panel Violates the Regulatory Flexibility Act

I. EPA Lacks the Authority Under the Toxic Substances Control Act to Impose Dust Wipe Testing or Clearance Requirements on Renovators

There are several key respects in which the proposed amendments to the Rule, to the extent they include requirements for any form of dust wipe testing or clearance testing, would exceed the statutory authority Congress granted to EPA under Title X. For the reasons set forth below, EPA should withdraw its proposal to add these requirements in light of the limits on its authority.

A. EPA can only issue guidance concerning renovation work practices¹

Based on the plain language of the statute, EPA lacks authority under TSCA to promulgate regulations requiring any form of clearance testing because such requirements are part of work practice standards, which can only be the subject of Agency guidelines. Section 402(a)(1) of TSCA only authorizes EPA to promulgate regulations “to ensure that individuals engaged in [lead-based paint] activities are properly *trained*; that training programs are *accredited*; and that contractors engaged in such activities are *certified*.” 15 U.S.C. § 2682(a)(1) (emphasis added). Moreover, while the statute also grants EPA authority to create standards for “lead-based paint activities,” such activities are defined, in the case of target housing, as “risk assessment, inspection, and abatement.” 15 U.S.C. § 2682(b)(1). Accordingly, work involving renovation, repair and painting is not included under the “lead-based paint activities” definition.

In enacting Section 402(c), Congress was very careful to distinguish between lead-based paint activities and RRP activities and that section does not explicitly authorize EPA to promulgate regulations affecting the work practice standards for RRP activities, *e.g.*, requiring clearance testing. Instead, Congress authorized EPA to “promulgate *guidelines* for the conduct” of RRP activities and to require certification of RRP firms that are engaged in activities that create lead-based hazards. 15 U.S.C. § 2682(c)(1) and (3). The statute also requires EPA, after undertaking certain studies, to revise the regulations developed for abatement and other lead-based paint activities to apply to RRP activities. *Id.* § 2682(c)(3). Thus, Congress intended that EPA would apply appropriate certification requirements developed in connection with lead-based paint activities to RRP contractors but that work practice standards – including clearance testing requirements – would remain the subject of guidelines, not regulations.

Further, the plain meaning of the statute is supported by the fact that the provision requiring EPA to engage in a study prior to promulgating regulations for RRP activities (Section 402(c)(2)) is entitled “Study of certification” and the provision concerning subsequent promulgation of regulations (Section 402(c)(3)) is headed “Certification determination.” *See I.N.S. v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183 (1991) (section titles can serve as aids to the construction of statutory language where the language is ambiguous); *see also Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (the title of a section is an indication of its meaning). In contrast to the preceding provision concerning guidelines for work practice standards, the focus of Section 402(c)(2) and (3) is the certification of contractors. Therefore, the focus of rulemaking development under Section 402(c)(3) must be on certifications of contractors and any attempt by EPA to require contractors to comply with work practice standards such as any form of clearance testing is beyond EPA’s statutory authority.

¹ Lead-safe work practices do provide health and safety benefits. However, EPA is without the authority to require such practices. Nevertheless, contractors that comprise the regulated community endeavor to use work practices that protect human health and the environment.

B. EPA has not established that all the activities being regulated create lead-based paint hazards

EPA's proposed dust wipe testing and clearance testing requirements also exceed the Agency's authority because EPA has not established that the activities it seeks to regulate create lead-based paint hazards. Any activity that does not create a lead-based paint hazard "does not require certification" under Section 402(c)(3) and cannot be regulated by EPA. See Comments by the National Ass'n of Home Builders Regarding EPA's Proposed Rule: Lead Renovation, Repair and Painting Program, Published in the Federal Register, January 10, 2006 at 71 FR 1587, Section II(C) ("NAHB LRRP Rule Comments") (May 25, 2006). ("In those cases where EPA has not demonstrated that typical RRP activities create lead hazards, the Agency is prohibited from addressing them in this rule"). Such RRP activities may only be subject to EPA guidelines. See 15 U.S.C. § 2628(c)(1).

The Agency may not impose the type of clearance requirements it has proposed because it has failed to demonstrate that RRP activities create the type of hazard that is a predicate for regulation under Section 402(c). The statute does not authorize EPA to regulate RRP activities simply because they disturb lead-based paint, as RRP activities may do. Instead, Section 402(c)(3) requires EPA to promulgate regulations with respect to RRP activities only where such activities create a lead-based paint hazard. The statute does not provide specific authorization to EPA to regulate RRP activities that do not create a lead-based paint hazard. Consequently, from that silence EPA lacks authority to regulate RRP activities unless they create a lead-based paint hazard. See, e.g., *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (where Congress knows how to say something but chooses not to, its silence is controlling). Therefore, because Section 402 is silent as to EPA's authority to regulate RRP activities that do not cause a lead-based paint hazard, such authority is lacking.

EPA does not address this aspect of the extent of its regulatory authority in the proposed amendments because it has purported to find that all RRP activities that disturb lead-based paint create a lead-based paint hazard. However, there is a lack of evidence to support such a conclusion. Generally, most RRP activities either eliminate or reduce the potential for future lead-based paint hazards. For example, the Mercatus Report stated that "evidence collected [in EPA's Study] following the passage of the statute has indicated that lead hazards created by renovation and remodeling work are minimal, and RRP work removes chipping and deteriorating paint – two of the leading causes of elevated blood-lead levels." See Comments of the Regulatory Studies Program, Mercatus Center, George Mason University at 30 (May 25, 2006) ("*Mercatus Report*").

Other studies have reached similar conclusions. NAHB's own study noted that "when considering lead dust loading on surfaces throughout a single property, results showed that overall all but one of the properties evaluated showed *lower levels of lead dust when R&R contractors completed the work than when they arrived.*" NAHB, *Lead-Safe*

Work Practices Survey Project Report 2 (Nov. 2006) (the “*NAHB Report*”) (emphasis added). Moreover, the Wisconsin Department of Health and Family Services (“WDHFS”) noted that “our experience in Wisconsin is that *professional renovation is rarely the cause of lead poisoning in children.*” Wisconsin Department of Health and Family Services, *Comments: Lead; Renovation, Repair, and Painting Program; Proposed Rule* (emphasis added).

In light of these studies, an ample basis exists in the record for concluding that most RRP activities do not create lead-based paint hazards, but rather minimize and even eliminate such hazards. As discussed above, the statute limits EPA’s regulatory authority to those activities that actually create a lead-based paint hazard, which means that RRP activities would generally be exempt from EPA’s authority under Section 402(c)(3). To the extent that EPA is without authority to promulgate enforceable regulations with respect to such activities, it is likewise prohibited from requiring renovators engaged in RRP activities to conduct dust wipe testing or clearance testing.

C. EPA has not satisfied the requirement to conduct a study to determine which types of renovation activities create lead-based paint hazards because the studies the Agency conducted are flawed

EPA also is without authority to promulgate dust wipe testing or clearance testing requirements for RRP activities because the Agency has not satisfied the prerequisite of conducting a congressionally-mandated study as set forth under the relevant statute for imposing regulatory requirements on RRP activities. Prior to promulgating any regulations involving RRP activities, EPA was required to conduct a “Study of certification” to determine which of the “various types of renovation and remodeling activities . . . disturb lead and create a lead-based paint hazard on a regular or occasional basis.” 15 U.S.C. § 2682(c)(2). Thus, EPA cannot promulgate any regulations affecting RRP activities until after it has satisfied the “Study of certification” requirements.

The Agency has undertaken a four-part study (the “Study”) in an attempt to satisfy the study requirement, but the administrative record provides an ample basis for questioning the validity of the Study and its conclusions. One of the most comprehensive critiques of the Study comes from the Mercatus Center at George Mason University, which conducted a “careful and independent analys[is] employing contemporary economic scholarship to assess [the] rulemaking proposal[] from the perspective of the public interest.” *Mercatus Report* at 1. According to the *Mercatus Report*, the conclusions made in EPA’s Study did not match its content. *Id.* at 23. For example, based on a review of EPA’s own data, the *Mercatus Report* concluded that:

- Phases I and II of the Study “failed to find a connection between elevated blood-lead levels and workers’ exposure to considerable amounts of lead-contaminated dust;” and

- “[T]he Wisconsin [Phase III] study cannot claim that any RRP work increases the risk of elevated blood-lead levels in children.”

Id. at 10, 21; *see also* NAHB LRRP Rule Comments, Section II(B)(4).

Several members of the peer review panel involved in evaluating the Study also raised concerns about various aspects of the methodologies employed. For example, EPA reported that “[i]n regard to the Wisconsin blood-lead registry, another issue of concern among the reviewers was how representative the registry is of the state population.” *See* Phase IV Report at 1.3. However, the Study failed to adequately address these and other concerns. In other words, contrary to EPA’s conclusions, the Agency’s own Study failed to show that unregulated RRP activity contributed to increased blood-lead levels in *either* RRP workers or in children residing in homes that were being remodeled. NAHB likewise pointed out in its prior comments to EPA that “the studies cited do not illustrate a definitive link between renovation and remodeling activities and lead poisoning in children.” *See* NAHB LRRP Rule Comments, Section II(B).

EPA has based its decision to regulate RRP activities on the conclusions made in the Study, when the underlying data suggest that there is little, if any, need for such regulation. Because the conclusions of the Study are not supported by the underlying data, EPA has not satisfied the requirements of Section 402(c)(2) because it has not adequately determined the “extent to which persons engaged in various types of renovation and remodeling activities . . . are exposed to lead in the conduct of such activities or disturb lead and create a lead-based paint hazard” as required by Congress. 15 U.S.C. § 2682(c)(2). Therefore, EPA is not entitled to “utilize the results of the study” as a justification for promulgating dust wipe testing and clearance testing requirements for RRP activities. 15 U.S.C. § 2682(c)(3).

II. EPA’s Proposed Requirements Are Inconsistent With the Statute Because They Eliminate the Distinction Between Abatement and Renovation

The imposition of dust wipe testing and clearance testing requirements as proposed by EPA is inconsistent with the intent of Congress because at a fundamental level it eliminates the distinction between abatement contractors on the one hand and renovators on the other. “Abatement is intrinsically very different from remodeling,” and this reality is reflected in the statute, which sets forth separate regulatory schemes for “lead-based paint activities,” including abatement, and renovation and remodeling. NAHB LRRP Rule Comments at 23 (May 25, 2006). Moreover, those regulatory schemes differ in key respects. For example, Section 402(a) requires that *all* abatement contractors be properly trained and certified and that *all* abatement activities conform to work practice standards promulgated by the Agency. In contrast, Congress gave EPA flexibility in determining whether contractors engaged in RRP activities should be subject to regulatory requirements.

The legislative history of Title X supports the conclusion that Congress believed RRP activities and lead-based paint activities were distinct and that each required a different

level of government regulation. For example, the Senate Committee on Banking, Housing and Urban Affairs recognized that not all RRP activities would create lead-based paint hazards and that, unlike lead-based paint activities (risk assessment, inspection, abatement), not all RRP activities would require the use of certified workers. As the Committee stated:

Although the committee is aware that some home remodeling and renovation projects which have not incorporated lead reduction measures have aggravated lead-based paint hazards, and caused poisoning of workers and children, *not all such projects are inherently dangerous*. The level of hazards is a function of the extent to which lead-based paint is disturbed and the amount of dust lead generated. *The committee recognizes that some federally funded renovation projects in housing containing lead-based paint will not require certified workers* because it will not involve significant dust generation or the disturbance of painted surfaces.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

In fact, many RRP activities are more closely related to a category of activities referred to as “Interim Controls” in the bill before the Committee (which included “repairs, maintenance, [and] painting”) than they are to abatement and other lead-based paint activities. “Interim Controls would be measures which temporarily reduce human exposure or likely exposure to lead-based paint hazards. These measures would include specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs.” *Id.* at 115. In the bill it reported out, the Committee chose not to impose any training and certification requirements on individuals carrying out interim control measures, stating that:

These activities typically involve *less* potential for generating dangerous levels of dust, and are not much different from the types of activities routinely carried out by housing residents and maintenance personnel.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

EPA itself has recognized that abatement activities and renovation differ in fundamental respects. In issuing the LRRP Rule, the Agency acknowledged that “[t]he purpose of an abatement project is to permanently eliminate lead-based paint and lead-based paint hazards.” 71 Fed. Reg. at 1613. As a consequence, EPA concluded, it is “perfectly appropriate” to require an abatement contractor to undertake testing once the work is completed to ensure that the lead-based paint hazards have in fact been eliminated. *Id.* In contrast, EPA recognized that “renovations may be performed for many reasons,

most of which have nothing to do with eliminating lead-based paint hazards.” *Id.* at 1613-14. The Agency further recognized that “if clearance testing using dust wipes were required after every renovation job, it could have the effect of holding the renovation firm responsible for abating all lead dust hazards, including such hazards that may have existed in the area before the renovation commenced.” *Id.* at 1614.

To the extent that EPA imposes clearance testing requirements, the Agency will effectively eliminate any distinction between renovation and abatement. *Id.* at 250050 (“EPA is proposing to require renovation firms to follow a clearance process similar to that performed after abatement projects . . .”). Indeed, the amended Rule would impose more requirements on renovators, who have to follow specified cleaning requirements, than contractors performing abatement projects. Even the dust wipe testing requirements in the amended Rule impermissibly blur the distinction between abatement and renovation. For instance, dust wipe testing will effectively make renovators responsible for any lead dust left in the residence after the job that is in excess of applicable standards unless the renovators incur the additional costs associated with baseline testing. Consequently, whether the task carried out is one of renovation or abatement, the company performing the work must meet the cleanliness standards regardless of conditions that existed prior to the commencement of the work.

Accordingly, notwithstanding the fundamental distinction between abatement and renovation, the imposition of dust wipe testing and clearance testing requirements imposes essentially the same burden on the renovator as the abatement contractor, *i.e.*, to leave the work area in a clean, relatively dust-free (and therefore lead dust-free) condition. In the case of abatement contractors, remedying pre-existing conditions and rendering the work area free of lead is precisely the point of the work. However, the purpose of a renovation project is to change the appearance of the home in some fashion without regard to the presence of lead, and it is therefore inappropriate to impose liability on renovators for failing to remedy pre-existing conditions. Thus, the imposition of dust wipe testing and clearance testing requirements would erode the distinction between abatement contractors and renovators in critical respects, which is contrary to the intent of Congress to maintain the distinction between the two types of contractors.

III. EPA’s Proposed Imposition of Dust Wipe Testing and Clearance Requirements is Arbitrary and Capricious

Even if EPA had authority under the statute to impose clearance testing and other requirements on renovators, EPA’s proposed amendments would still be legally deficient because they are arbitrary and capricious. As the U.S. Supreme Court has stated, an agency’s decision will be vacated if it “has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *National Ass’n of Home Builders v. Defenders of*

Wildlife, 127 S. Ct. 2518, 2530 (2007). Moreover, EPA must articulate an explanation that includes “a rational connection between the facts found and the choice made.” *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 952 (D.C. Cir. 2007). A court should uphold EPA’s action only if the court can discern a “reasoned path” from the facts and considerations before the Agency to the decision it reached. *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1187 (D.C. Cir. 1996) (*per curiam*).

Accordingly, if EPA has offered an explanation for its decision that runs counter to the evidence before it, a court should find the Agency’s action to be arbitrary and capricious. *American Coke & Coal Chemicals Inst. v. Environmental Protection Agency*, 452 F.3d 930, 941 (D.C. Cir. 2006). Here, EPA’s explanation for its rulemaking decisions run counter to the evidence in the record that was before the Agency.

A. The Agency has simply changed its mind without citing any new data or circumstances to justify its new direction

When changing a final rule, an agency must provide a reasoned explanation for the change. See *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1561 (D.C. Cir. 1991); see also *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (stating that an agency may change its past practices, especially under changed circumstances, so long as it provides a reasoned explanation for its action). If an agency fails to explain its reassessment, then the courts will decline to find that the agency had an adequate basis for its decision. *Fox*, 931 F.2d at 1561. In amending the Rule to include dust wipe testing and clearance testing requirements, EPA has reversed course without citing any data or other information that has come to light since April 2008 that casts doubt on its prior position. See 75 Fed. Reg. at 25057 (References). Rather, it appears that the Agency simply changed its mind even before it implemented the Rule as the result of the settlement of a lawsuit. See 75 Fed. Reg. at 25044. In the absence of a reasoned explanation for the change in the Rule regarding dust wipe testing and clearance testing, the Agency’s decision is arbitrary and capricious.

B. The Agency notes the concerns which led it to reject dust wipe testing and clearance requirements for renovation activities but fails entirely to explain how its new proposal is justified in the face of those same concerns

EPA gave “significant weight to the cost . . . and liability concerns” in crafting the Rule. See 75 Fed. Reg. at 25046. In proposing to amend the Rule, EPA concedes that the imposition of dust wipe testing and clearance testing will make renovation and remodeling activities more expensive. See 75 Fed. Reg. at 25044 (“EPA also recognized that dust wipe testing and clearance as required after abatements can be expensive.”). Further, the Agency acknowledges that the amendments will prompt renovation and remodeling contractors to take measures to protect themselves against future liability. *Id.* at 25045 (noting that EPA considered the “white glove” method an alternative to clearance in order to protect contractors against liability for pre-renovation

dust). However, EPA has not adequately explained why it reached a different conclusion on dust wipe testing and clearance testing when the factors to be balanced remained unchanged. *See id.* at 25046. (“EPA has continued to balance these considerations in today’s proposal, but has preliminarily concluded that, for certain jobs, the additional benefits of dust wipe testing, and in some cases clearance, warrant imposing these additional requirements.”). Such a course of action is arbitrary and capricious.

C. The costs of the proposed amendments outweigh the minimal benefits of the proposed new requirements, particularly in light of EPA’s conclusions regarding the effectiveness of the existing cleaning verification requirements

EPA’s imposition of dust wipe testing and clearance testing requirements is also arbitrary and capricious because the costs of the proposed requirements will outweigh their benefits. Currently, renovators clean up and conduct a visual inspection of the work area after completing a project. EPA itself has noted that this type of cleanup typically reduces the percentage of lead in the affected areas by over 99%. *See EPA, Final Summary Report 8* (“[S]imple broom and shop-vacuum cleanup resulted in substantial reduction in the total amount of lead available to occupants.”); *see also Mercatus Report 10-11*; 75 Fed. Reg. at 25049 (stating that in the Dust Study “experiments, cleaning verification was needed to reduce average dust lead levels below the standards”); *id.* at 25051 (“the Dust Study suggests that it would be unlikely for a surface that had been cleaned and had gone through the cleaning verification process to fail another round of cleaning verification”). As NAHB documented in its report, because such cleanups are so effective most homes are less likely to have current or future lead-based hazards after the RRP activities have occurred than they were before the RRP activities took place. *NAHB Report at 2* (“the post-work samples collected from all surfaces were lower than the pre-work dust samples in all of the activities evaluated”); *see also 75 Fed. Reg. at 25049* (“Cleaning verification is useful because it combines fine cleaning properties with feedback to the certified renovator on the effectiveness of the post-renovation cleaning process.”).

In contrast to the benefits of the existing regime, the only benefits proffered by EPA for its proposed changes are (1) providing more information to the owners and occupants of the affected buildings, and (2) changed behavior on the part of the contractors during the cleanup after renovation. *See 75 Fed. Reg. at 25060*. However, these assumed benefits are insufficient to justify the proposed amendments. First, improvement of the population’s “understanding and awareness of dust-lead hazards” - while a worthy objective - should not be the primary reason behind the proposed change. The Agency could enlighten citizens regarding the dangers of lead dust in more cost-effective ways than requiring contractors to undertake dust wipe testing and clearance testing.

Indeed, information regarding these dangers is already available and the means of dissemination are mandated by Congress. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 provides a direct avenue for EPA to reach owners

and occupants of target housing, and establishes a clear process for informing owners and occupants about the potential for lead-based paint exposure and health impacts. See Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. 102-550, § 1018. Section 1018 requires sellers and lessors of target housing to provide prospective buyers and tenants with a lead hazard information pamphlet. *Id. at* § 1018(a)(1)(A). In addition, the sale or rental contract must include a “lead warning statement,” alerting the prospective buyer or tenant that, because of the age of the home, lead-based paint may be present. The statement describes the health risks associated with lead-based paint with emphasis on young children and pregnant women. *Id. at* §1018(a)(2)-(3). Any known lead-based paint hazards must be disclosed, and any documentation pertaining to these hazards must be presented to the buyer/tenant. *Id. at* § 1018(a)(1)(B). Furthermore, a prospective buyer or tenant also has at least a 10-day opportunity to have the property tested for lead before becoming obligated under the contract. *Id. at* §1018(a)(2)(C).

The penalties for noncompliance are steep and include federal monetary penalties as well as civil remedies for the buyer or tenant when the seller, lessor, or any agents involved in the transaction fail to comply with Section 1018 or the implementing regulations. Thus, Section 1018 is a powerful tool that provides EPA with direct access to the occupants of target housing even before they enter the home.

As EPA has recognized, Section 402 does not grant it authority to regulate homeowners or occupants who choose to perform their own renovation activities.² Nor does Section 402 authorize EPA to disseminate information to owners and occupants. Thus, Section 402 and its implementing regulations³ fail to provide EPA with any authority to provide information to residents or change residents’ behavior under Section 402.

Instead, Congress has provided two methods for information dissemination to owners and occupants, including Section 1018, which is discussed above. The other statutory mechanism for providing information to residents regarding lead-base paint hazards is found in TSCA Section 406. That provision requires EPA to produce an informational pamphlet describing lead-based paint hazards that may be present in a home built before 1978, the risks these hazards pose to occupants of the property, the role renovation may play in creating these risks, methods for evaluating and reducing hazards, and information on how to locate contractors that specialize in lead-based paint hazard evaluation and reduction. See TSCA, § 406(a). Then, Congress specifies the method for dissemination of this pamphlet – “each person who performs for

² See Lead; Renovation, Repair, and Painting Program; Lead Hazard information Pamphlet; Notice of Availability; Final Rule, 73 Fed. Reg. 21692, 21708 (Apr. 22, 2008) (“EPA thus interprets the statutory directive to regulate remodeling and renovation activities found in TSCA section 402(c)(3) as applying to contractors and not a broader category of persons, such as homeowners.”); see also Lead; Requirements for Lead-Based Paint Activities; Proposed Rule, 59 Fed. Reg. 45872, 45873-4 (Sept. 2, 1994).

³ E.g., 73 Fed. Reg. 21692 (Apr. 22, 2008).

compensation a renovation of target housing [must] provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation.” TSCA, § 406(b). However, there is no mention of any other form of information dissemination within Section 406(b), and Section 402 is silent on the issue. Long-standing rules of statutory interpretation clearly state that where Congress “knows how to say something but chooses not to, its silence is controlling.” *In re Hass*, 48 F.3d 1153, 1156 (11th Cir. 1995); *see also discussion infra*, p. X.

Thus, not only does EPA have a mechanism to directly reach owners and occupants of target housing in a cost-effective manner that provides information at a time when exposure to lead hazards may be prevented entirely, but Congress is clear on the role the renovator contractor is to play in informing residents about lead-based paint hazards. The Agency has no authority under Section 402 to require information dissemination to residents through a requirement imposed on the renovation contractor.

The other benefits cited by EPA for dust wipe testing and clearance testing relates to the change in behavior of the contractor that EPA hopes to see as a result of the imposition of these requirements. In effect, the Agency is citing this changed behavior as one of the reasons for the proposed amendments without having any information as to how the proposed requirements would actually benefit the populations of concern. Given that RRP activities generally do not result in lead-based paint hazards and standard cleanup procedures result in the removal of almost all of the lead from the work area, the dust wipe testing and clearance testing procedures will result in minimal benefit.

At the same time, the costs associated with dust wipe testing and clearance testing will be significant. These costs include not only the expense of administering the dust wipe testing and clearance test itself, but also include the opportunity costs associated with delays in completing projects and a resulting inability to take on additional projects due to the clearance testing. In addition, as EPA itself has recognized, renovators may feel compelled to document pre-existing conditions due to liability concerns, which would further increase costs. *See* 71 Fed. Reg. at 1614. These costs associated with dust wipe testing and clearance testing outweigh the minimal benefits of clearance testing and call into question the rationales for imposing such requirements.

As noted above, visual inspections following a typical post-project cleanup are extremely effective and, according to EPA’s own Study, typically reduce the lead concentration in a home by over 99%. While this method of inspection is effective, simple and inexpensive, dust wipe testing and clearance testing are more time-consuming and more expensive. It would be arbitrary and capricious for EPA to require more expensive and complicated dust wipe testing and clearance testing that would provide little additional benefit as opposed to a simpler, more effective, and less expensive visual test, especially after EPA itself has admitted the many drawbacks associated with these proposed requirements.

D. The proposed rule will actually undermine EPA’s goal of minimizing risk to young children and other exposed populations

The dust wipe testing and clearance testing requirement will actually undermine the very goal that EPA seeks to achieve, *i.e.*, overall reduction of lead-based paint hazards. As renovators incur the costs associated with dust wipe testing and clearance testing, they will pass some of those costs along to their customers in the form of higher prices for services. NAHB’s survey demonstrates that most homeowners are unwilling to absorb significant costs for dust wipe testing and clearance testing. NAHB, *Report on Lead Paint Test Survey* (April 2007). As a result of the higher prices occasioned by dust wipe testing and clearance testing, some homeowners may elect to postpone renovations, meaning that areas with lead-based paint will remain in homes longer. In other cases homeowners – who will not be subject to EPA’s regulatory requirements – will undertake such activities on their own, or will hire underground and/or unregulated contractors. In either case, the work may be done in a way that causes more lead dust and cleanups may not be as thorough.

As noted by NAHB, the Mercatus Center, and others, the unintended consequence of the imposition of dust wipe testing and clearance testing requirements on professional renovators will be that more children and other people will be placed at risk for lead poisoning due to deteriorating homes. See NAHB LRRP Rule Comments at Section II(C)(2); see also *Mercatus Report* at 30. As the U.S. Court of Appeals for the Seventh Circuit has stated, a court “is not obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that . . . frustrate the congressional policy underlying a statute.” *Local 15 Int’l Brotherhood of Elec. Workers, AFL-CIO v. N.L.R.B.*, 429 F.3d 651, 656 (7th Cir. 2005). Thus, it would be arbitrary and capricious for EPA to impose requirements that will lead to an increased risk to the very population EPA is striving to protect.

IV. EPA’s Refusal to Convene a New Small Business Advocacy Review Panel Violates the Regulatory Flexibility Act

In the preamble of the proposed LRRP Rule Amendment, EPA states that it has complied with its obligation under the Regulatory Flexibility Act (“RFA”), including its responsibility to convene a Small Business Advocacy Review (“SBAR”) Panel. More specifically, EPA alleges that the SBAR Panel which was convened in 1999, and discussed in the preamble to the original LRRP Rule, satisfies any obligation the Agency might have to convene a SBAR Panel as a consequence of proposing the LRRP Rule Amendment. EPA is mistaken in this assumption.

EPA must convene a SBAR Panel any time “a rule is promulgated which will have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 609(a). EPA’s obligation to convene a SBAR Panel is not limited to situations in which an entirely new rule is being proposed. Instead, this obligation is triggered by any rulemaking – even the amendment of an existing rule – that would result in a significant

economic impact on a substantial number of small entities. For example, EPA convened a SBAR Panel to review proposed changes to existing regulations related to the certification of pesticide applicators. See EPA, *Panel 33b: Certification of Pesticide Applicators (Revisions)*.

By adding dust wipe testing and clearance testing requirements, the proposed LRRP Rule amendments would significantly alter the regulatory reach – and consequently the economic impact – of the LRRP Rule. EPA itself has recognized that the changes associated with the proposed amendments would result in a significant economic impact on a substantial number of small entities. See 75 Fed. Reg. at 25061. For example, according to EPA’s economic analysis related to the proposed LRRP Rule amendments, the additional requirements would cost small entities between 0.4% and 2.6% of their annual revenue. *Id.* Therefore, it is apparent that the proposed amendments trigger EPA’s obligation to undertake a RFA/SBREFA Screening Analysis and ultimately convene a new SBAR Panel.

EPA attempts to avoid this obligation under the RFA by stating that it “believes that the conclusions it made in 2008 regarding these recommendations are applicable to this proposal.” *Id.* Despite these claims, the proposed amendments to the LRRP Rule represent a major departure from the original LRRP Rule and would result in a significant economic impact on a substantial number of small entities. As such, the proposed amendments trigger EPA’s obligations to comply with the RFA, including an obligation to convene a SBAR Panel. To date EPA has failed to discharge this duty. As a result, EPA must delay the promulgation of the proposed amendments until after these obligations have been fully satisfied.

In closing, we would like to reemphasize that WDMA fully supports the intent of the *Residential Lead-Based Paint Hazard Reduction Act of 1992* (the Act) and shares EPA’s concern for protecting children and women who are pregnant from lead hazards, however under regulation that is well substantiated, cost effective, and reasonable.

We look forward to working with EPA to address our comments and concerns. Please contact us with any questions.

Sincerely,



Jeffrey Inks
Vice President
Code and Regulatory Affairs

cc: WDMA Board of Directors