UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC - 8 2016

OFFICE OF CHEMICAL SAFETY
AND POLLUTION PREVENTION

Susan Asmus
Senior Vice President
National Association of Home Builders
1201 15th Street NW
Washington, DC 20005

Dear Ms. Asmus:

The U.S. Environmental Protection Agency has completed its review of your July 5, 2016 petition requesting that the EPA reconsider its final rule published on February 17, 2016, (81 Fed. Reg. 7987) to amend the renovator recertification requirements. The petition invoked the Administrative Procedure Act (APA) (5 U.S.C. § 553(e)) and section 21 of the Toxic Substances Control Act (TSCA).

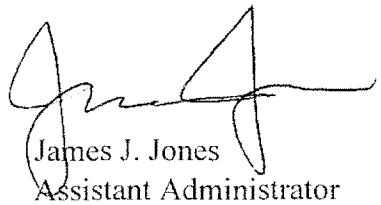
Based on this review of your request, the EPA is denying the petition under section 553(e) of the APA. As stated in the August 5, 2016 letter to you from Wendy Cleland-Hamnett, Director of the Office of Pollution Prevention and Toxics, your request was not considered a petition under section 21 of TSCA because TSCA section 21 does not apply to TSCA Title IV – Lead Exposure Reduction (including sections 402(a) and 402(c)(3), pursuant to which the February 17 rule was promulgated).

In your petition, you contend that EPA failed the APA's logical outgrowth test by not providing adequate information in the proposed rule so that the public could offer comments and have an opportunity to contribute to the administrative record. You further state that the preamble gave no notice to the regulated community that the Agency was contemplating a bifurcated recertification schedule for renovators. Consequently, you believe the rule should be repealed. However, all the arguments that you raise in your petition regarding procedural issues are untimely. TSCA section 19(a)(1) specifies a jurisdictional window of 60 days for judicial review of a rule promulgated under TSCA Title IV, such as the February 17, 2016 final rule. EPA regulation further details when promulgation begins for a TSCA rule for purposes of judicial review under section 19(a)(1). 40 C.F.R. § 23.5. Here, for purposes of judicial review, promulgation occurred on March 2, 2016, two weeks after publication in the Federal Register. Thus, the window of 60 days for judicial review passed before your petition was received by EPA. All of NAHB's procedural arguments could have been asserted during the window for judicial review. NAHB had its opportunity to seek judicial review of the final rule at that time but did not do so. Accordingly, EPA declines to now consider your untimely procedural arguments.

On the other concerns of your petition, however, you further state that the rule is unnecessarily burdensome and complicated, discouraging participation and jeopardizing sufficient coverage. You contend that the rule increases uncertainty because it adds two tracks to renovator recertification on different time schedules making the recertification process cumbersome and difficult. EPA respectfully disagrees with these concerns (and to the extent EPA addressed them in the final rule, EPA is not reconsidering its position or reopening those issues). EPA does not believe that the final rule is burdensome and confusing and, accordingly, does not foresee the negative consequences you assert. As EPA explained in the final rule itself, the final rule projected an *increased* number of participating renovators (81 Fed. Reg. 7987, 7992). Renovators can now take the refresher training without hands-on learning if they choose, giving them another option for recertification. Renovators are not required to take advantage of this option. They can take the training with hands-on learning if they prefer. Regardless of which type of training someone takes, the certificate issued by the training provider will state the date the course was completed and when the certification expires (40 C.F.R. § 745.225(c)(8)(iii) and (viii)), in either three or five years, making it easy for renovators to know when they need to be retrained and which refresher training they are eligible to take. Accordingly, given EPA's disagreement with the policy arguments asserted by NAHB, EPA denies your petition for amendment or rescission based on your policy concerns.

Thank you for your continued interest in the Agency's efforts to reduce lead exposures. If you have questions relating to your petition, contact Michelle Price of my staff at (202) 566-0744.

Sincerely,



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September 29, 2010

The Honorable Lisa P. Jackson
Office of the Administrator
Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Avenue, N.W.
Washington D.C. 20460

Re: Petition for Rulemaking concerning EPA's Lead; Renovation, Repair, and Painting Rule

Dear Administrator Jackson:

On behalf of the National Association of Home Builders (NAHB), I respectfully petition the U.S. Environmental Protection Agency (EPA), pursuant to the Administrative Procedure Act, to amend its Lead; Renovation, Repair, and Painting Rule (RRP Rule) to reflect the lack of an improved EPA-recognized test kit and the economic ramifications stemming from the unavailability of such a test kit.

NAHB is a Washington, D.C.-based trade association representing more than 175,000 members involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. Known as "the voice of the housing industry," NAHB is affiliated with more than 700 state and local home builder associations (HBAs) around the country. NAHB's builder members will construct about 80 percent of the new housing units projected for 2010.

Approximately half of our builder members acknowledge that home renovation is a part of their business model. More than 14,000 firms belong to NAHB Remodelers and comprise about one-fifth of all firms that specify remodeling as a primary or secondary activity. NAHB's membership also includes nearly 1,000 multi-family construction firms and property

management companies. These NAHB members, along with renovation consumers living in homes built before 1978, are significantly impacted by the absence of an improved test kit. Without an affordable means to determine whether a property contains regulated amounts of lead-based paint, millions of properties that have no lead-based paint hazard will be subject to costly lead-safe work practices.

Introduction

The RRP Rule mandates that all "for hire" contractors performing renovation work in properties that meet either the statutory definition of "target housing" or EPA's regulatory definition of "child-occupied facilities" must comply with its requirements.[1] The RRP Rule provides two exemptions from its applicability provisions. The first exemption is available where a risk assessor or lead inspector has certified that the building components to be disturbed during the renovation are free of lead-based paint (LBP).[2] The second exemption applies where a certified renovator using an EPA-recognized test kit has tested the relevant building components for lead-based paint prior to beginning the renovation and achieves a negative result.[3]

In the RRP Rule, EPA described the process by which it would recognize the test kits that certified renovators may use to take advantage of the second exemption. Recognizing the need to improve upon the existing test kits, EPA also instituted a phased approach in determining which test kit would be used. The final rule allows renovators to use existing test kits satisfying only the "negative response criteria," i.e., a false-negative rate of 5%, until September 1, 2010. After September 1, 2010, only improved test kits that satisfy both negative and positive response criteria i.e., a false negative rate of 5% and a false positive rate of 10%, can be used by certified renovators to qualify for the second exemption.[4]

Contrary to this requirement, on July 27, 2010, EPA announced on its website that no EPA-recognized test kit fully satisfying section 745.88(c) would be available by September 1, 2010. Furthermore, EPA's announcement stated it expected the current EPA-recognized test kits to remain in use until the Agency publicizes, at a date uncertain, that an improved EPA-recognized test kit is

[1] 15 U.S.C.A. § 2681(17); 40 C.F.R. § 745.83.
[2] 40 C.F.R. § 745.82(a)(1), 40 C.F.R. § 745.226.
[3] 40 C.F.R. §745.82(a)(2).
[4] 40 C.F.R. § 745.88(c).

capable of achieving the positive and negative response criteria required under the EPA rule.[5]

The RRP Rule very clearly states that after September 1, 2010, all EPA-recognized test kits capable of detecting the presence of LBP at regulated levels must achieve a certain level of accuracy for both negative and positive response criteria. To date, such test kits do not exist. Likewise, the agency has taken no action to remove the September 1, 2010 deadline or to clarify that the EPA-recognized test kits that are currently available and satisfy only the negative response criteria may be used after September 1. As a result, compliance is unclear and the existing rule is very different from the one envisioned when it was finalized in 2008, analyzed in the Economic Analysis (EA), and approved by the Office of Management and Budget (OMB). Indeed, NAHB believes that if the true costs of the RRP Rule were considered (recognizing an EPA-recognized test kit for both variables does not exist), the agency would not have finalized the rule as it exists today.

NAHB therefore respectfully petitions EPA to use its authority under 5 U.S.C. section 553(e) to initiate a rulemaking to address the confusion regarding the requirements for EPA-recognized test kits after September 1, 2010. Furthermore, given the crucial role EPA-recognized test kits play under the RRP Rule by reducing overall compliance costs by focusing on those properties that do in fact contain LBP, EPA is urged to revise the various economic analyses used to support the rule and consider finalizing an amended rule that reduces the overall economic burden on property owners and contractors. At a minimum, EPA should honor the pledge it provided in the preamble to the RRP, published April 22, 2008, which stated, "[i]f the improved test kits are not commercially available by September 2010, EPA will initiate a rulemaking to extend the effective date of this final rule for 1 year with respect to owner-occupied target housing built after 1960."[6] The rationale for these actions is explained below.

1. The Unavailability of an EPA-Recognized Test Kit Requires Immediate Changes to the RRP Rule.

The RRP Rule maintains an exception for renovations conducted in pre-1978 housing where a certified renovator uses an "EPA-recognized test kit" to determine that the components that will be impacted by the renovation are free of

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[5] U.S. Environmental Protection Agency, *EPA Recognition of Lead Test Kits*, EPA's website: http://www.epa.gov/lead/pubs/testkit.htm#recognized, last visited on September 2, 2010

[6] *Lead; Renovation, Repair, and Painting Program; Final Rule,* 73 Fed. Reg. 21713 (Apr: 22, 2008).

lead paint at or in excess of the regulated level (1.0 milligrams per square centimeter or 0.5% by weight).[7] A recognized test is defined as "a commercially available test kit recognized by EPA under section 745.88 as being capable of allowing a user to determine the presence of lead at levels equal to or in excess of 1.0 milligrams per square centimeter, or more than 0.5% lead by weight, in a paint chip, paint powder, or painted surface."[8]

Section 745.88 describes the process by which EPA will recognize test kits, including the evaluation criteria to be used. The rule establishes two evaluation criteria for test kits, termed "negative" and "positive." The negative response criteria requires a demonstrated probability, with 95% confidence, of a negative response less than or equal to 5% of the time.[9] In order to satisfy the "positive" criteria, there must be a demonstrated probability, with 95% confidence, of a positive response less than or equal to 10% of the time.[10] In other words, the fully compliant test kit envisioned by EPA would give a false positive reading (e.g., incorrectly indicating the presence of LBP at federally regulated levels) no more than 10% of the time, and would give a false negative reading (e.g., incorrectly indicating that LBP is not present at federally regulated levels when, in fact, it is), no more than 5% of the time.

In response to the 2008 RRP, EPA designated test kits that satisfied the negative criteria only as EPA-recognized beginning June 23, 2008.[11] Section 745.88(a) explained, "[t]his recognition will last until EPA publicizes its recognition of the first test kit that meets both the negative response and positive response criteria."[12] Additionally, section 745.88(b) describes the process and timeline by which new test kits would be considered and states, "starting September 1, 2008, EPA would initiate the screening process using the "Environmental Technology Verification" program."[13] Section 745.88(b)(3) then establishes a clear delineation between the use of negative criteria only and negative and positive criteria test kits, as it reads,

> "Before September 1, 2010, test kits must meet only the negative response criteria in paragraph (c)(1) of this section. The recognition of kits that meet only this criteria [*sic*] will last until EPA publicizes its recognition of the first test kits

[7] 40 CFR § 745.22(a)(2).
[8] 40 CFR § 745.83.
[9] 40 CFR §745.88(c)(1).
[10] 40 CFR § 745.88(c)(2).
[11] 40 CFR §745.88(a).
[12] *Id.*
[13] 40 CFR §745.88(b)(1)-(2).

> that meets [*sic*] both of the criteria in paragraph (c) of this section."[14]

The language above is identical to the language at section 745.88(a). However, section 745.88(b) does not stop here. Instead, it goes on to state: "After September 1, 2010, test kits must meet ***both*** of the criteria in paragraph (c) of this section."[15] (emphasis added)

On July 27, 2010, EPA announced its preliminary conclusion that no test kits meet both criteria required in paragraph (c), and that no test kit is expected to meet both criteria in the foreseeable future.[16] EPA further states that it will "continue to recognize" the two tests currently recognized as satisfying the negative criteria, and NAHB learned from EPA staff that the agency does not intend to amend the RRP Rule to remove the September requirement. NAHB disagrees with this approach. The regulation clearly imposes a September 1, 2010 deadline for all EPA-recognized test kits under the RRP Rule to achieve both the positive and negative response criteria required under section 745.88(c).

EPA has interpreted the RRP Rule to permit the agency to continue to recognize the negative-criteria only test kits after September 1, 2010, solely on the basis of section 745.88(b)(3).[17] This interpretation ignores entirely the express prohibition against the use of these test kits after September 1, 2010, which appears in the subsequent section, 745.88(b)(4). While EPA's discretion to interpret its regulations is broad, it is not absolute. Courts have consistently held that an agency's interpretation is given substantial deference "unless it is plainly erroneous or inconsistent with the regulation."[18] Moreover, where the regulation is unambiguous, the agency is not afforded this deference.[19] Here, the regulation clearly states, "After September 1, 2010, test kits must meet both of the criteria in paragraph (c) of this section." Thus, the agency's interpretation that the second sentence in section 745.88(b)(3) permits it to continue to

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[14] 40 CFR §745.88(b)(3).
[15] 40 CFR §745.88(b)(4).
[16] EPA, http://www.epa.gov/lead/pubs/testkit.htm (last visited August 30, 2010).
[17] *See id; see also* conversation with EPA staff August 25, 2010. However, EPA has to date issued no written interpretation of section 745.88 to support its recognition of the negative response criteria-only test kits after September 1, 2010.
[18] *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994).
[19] *Id.* (holding that the agency interpretation is granted deference "unless an alternative reading is compelled by the regulation's plain language" (internal citations omitted); *see also Exportal LTDA v. United States,* 902 F.2d 45, 50 (D.C. Cir. 1990)(" it is equally well established that this deference is due *only* when the plain meaning of the rule itself is doubtful or ambiguous.... Deference to agency interpretations is not in order if the rule's meaning is clear on its face.)(internal citations omitted).

recognize the existing test kits after September 1, 2010, should not be afforded deference.

While NAHB is relieved that its members may continue to use the test kits satisfying only the negative criteria, EPA is compelled to amend the RRP Rule to reflect the lack of an improved test kit covering both positive and negative criteria. Moreover, it needs to clarify for the regulated community that existing test kits satisfying only the negative criteria may be used after September 1, 2010. Failure to do so could result in further confusion in the regulated and training community as well as needlessly increasing remodeling costs for consumers who own properties that do not contain lead-based paint.

2. The Lack of an Improved Test Kit Compels a New Economic Analysis and a New Rule

EPA predicated the RRP Rule on the existence of an improved test kit that would reduce the overall costs associated with the Rule by identifying and exempting certain homes and activities that do not contain LBP from the rule's lead-safe work practices (LSWPs). Because an improved test kit does not exist and is not anticipated within the foreseeable future, EPA must revise its economic analysis and final rule to appropriately reflect the lack of an improved test kit.

The *2008 Economic Analysis* prepared for the final 2008 RRP Rule prominently discussed the role that an improved EPA-recognized test kit played in determining the costs of the regulation.[20] Not only did EPA envision a low-cost test kit, but also the kit was expected to identify those renovation projects that do not contain LBP and are therefore exempt from the RRP Rule. The test kits would save hundreds of millions of dollars annually that would otherwise be spent on unnecessary protective measures. According to the Economic Analyses prepared for both the final RRP Rule and later amendments, EPA stated the recognized test kits would satisfy three critical elements: be economical (less than $0.50 per test); provide fast results that would allow certified contractors to proceed with their renovation work without significant delay; and be reliable.[21] Reliability is defined in the RRP as meeting both the false positive and false negative criteria specified in section 745.88(c). Because

[20] *See, e.g.,* U.S. Environmental Protection Agency (EPA), *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities* ES-4 ("2008 Economic Analysis") ("As a result of the improved test kits, the number of events with lead-safe work practices under Option F [Final Rule] drops from 8.4 million to 4.4 million in the second year.").
[21] EPA, *2008 Economic Analysis*, Chapter 4, page 57.

the existing test kits do not satisfy EPA's reliability criteria, the analyses are flawed and must be redone.

In 2003, OMB issued guidance to the federal agencies on how to perform the regulatory analysis required under Executive Order (EO) 12866. That guidance directs all federal agencies to anticipate and evaluate the likely consequences of rules and identify the key effects of the various regulatory alternatives considered by the agency when developing the proposed regulation. The overall goal of this regulatory analysis is twofold: 1) to determine if the benefits of the proposed action are likely to justify the costs; and 2) to identify which of the possible regulatory alternatives would be the most cost effective.[22] By basing its economic analysis on the existence of a test kit that EPA now admits does not exist, the Agency cannot justify the final rule in its current form. To rectify this shortcoming, EPA must revisit the economic analysis and, as required under E.O. 12866, consider other regulatory options to reduce the overall cost of the RRP Rule.

In determining the scope of the 2008 RRP Rule, EPA estimated that in the first year of implementing the rule, there would be 8.4 million "LSWP events," or renovation events that would require the use of LSWPs. The economic analysis assumed that in the first year, test kits would have false positive rates of 63% (the midpoint between the range of false positives from 47-78%), and that an "improved test kit" would have a 10% false positive rate as required by the regulation.[23] The analysis stated that while "EPA is confident that improved test kits can be commercially available by September 2010," it nonetheless assumed that the improved test kits would not be available until the second year the rule is in effect.[24] Beginning in the second year, EPA estimated that the number of LSWP events would decrease to 4.4 million due to the existence of an improved test kit.[25] Thus, an improved test kit effectively reduces the number of LSWP events by nearly one half. Conversely, however, the lack of a reliable test kit keeps the number of projects that must use LSWPs at 8.4 million.

When EPA amended the RRP Rule in April 2010 to remove the opt-out provision, it also developed an economic analysis of that amendment (*2010 Economic Analysis*). Again, the agency relied explicitly on the existence of an "improved" test kit satisfying both the positive and negative criteria found in the

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[22] Office of Management and Budget, *Circular A-4*, September 13, 2003.
[23] *2008 Economic Analysis* at 4-19.
[24] *Id.*
[25] *Id* at ES-4.

RRP.[26] As a result, EPA estimated that removing the opt-out provision would add 5.4 million LSWP events in the first year of the regulation and 3.0 million in subsequent years – again due solely to the existence of an improved test kit.[27] Taken together to reflect the current regulatory regime (8.4 million with the opt-out plus 5.4 after its removal), EPA has estimated that without the test kits, a total of 13.8 million renovation events will require the use of LSWPs. With improved test kits, this number would drop to 7.4 million – a decrease of more than 46%.

As one would expect, with a decrease in the number of LSWP events comes a decrease in lead-safe work practice compliance costs. In the 2008 Economic Analysis, EPA estimated LSWP costs in the first year to be $490.7 million.[28] In the third year, which represents full implementation of the LRRP Rule along with the existence of a commercially available improved test kit, the total work practices cost is estimated to be $301.2 million with a 3% discount rate and $279.1 million with a 7% discount rate.[29] The 2010 Economic Analysis similarly estimates the additional work practice costs incurred with the removal of the opt-out provision at $336 million in the first year,[30] and $209 million with a 3% discount rate and $194 million with a 7% discount rate in the third year, which represents the first year of full compliance with all aspects of the regulation. [31] Adding these figures together to reflect the current regulatory regime, the total lead-safe work practices costs associated with the negative-criteria only test kit are estimated to be $826.7 million in the first year. With an improved test kit, the estimated work practice costs decrease to $510.2 million with a 3% discount rate and $473.1 million with a 7% discount rate.

However, contrary to EPA's estimates, which included decreased numbers of LSWP events in subsequent years due to the existence of a qualified test kit, because that kit does not exist, there will be no decrease in compliance costs because there will be no decrease in the number of LSWP events. Employing the same formula EPA used to determine discounted costs, NAHB

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[26] U.S. Environmental Protection Agency, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-Out and Recordkeeping Final Rule for Target Housing and Child-Occupied Facilities ES-4*, ("2010 Economic Analysis"), ("EPA is working on the development of test kits that accurately identify both the presence and absence of lead in paint at levels that exceed the Federal standards. This analysis assumes that improved test kits will be in use starting in June 2011. Thus, the number of events with lead safe work practices is estimated to decrease from the first year to the second year because of the adoption of the improved test kits.").
[27] *Id.* at ES-4, Table ES-3.
[28] EPA, *2008 Economic Analysis* at 4-133, Table 4-111.
[29] *Id.* at 4-136-137, Tables 4-114 to 4-115.
[30] EPA, *2010 Economic Analysis* at 4-83, Table 4-66.
[31] *Id.* at 4-84, Table 4-68.

calculates that the subsequent year costs become $779.2 million with a 3% discount and $722.1 million with a 7% discount – an additional cost of $250-270 million each year due to the absence of an improved test kit.

EPA relied so substantially on the existence of the test kit that its absence renders the economic analysis inaccurate. At a minimum, EPA should revise its economic analyses to reflect that there will be no difference between Year 1 and all subsequent years of the rule. EPA must also reflect the higher costs and delays associated with traditional LBP testing. EPA must then revisit the regulatory options to ensure it has chosen the most cost effective one.

3. Application of the RRP Rule to Homes Built After 1960 Should Be Delayed

EPA recognized that the likelihood of a home built between 1960 and 1978 containing lead-based paint was low and that existing test kits would unnecessarily test positive for lead in many of those homes. So much so, that it originally proposed in 2006 that the rule only apply to pre-1960 homes for the first effective year of the rule.[32] The reason for delaying the use of the RRP Rule in 1960-1978 properties was the lack of a more reliable improved test kit.[33]

In the preamble to the final RRP Rule, EPA described the circumstances surrounding its approval of the use of test kits in determining the presence of lead-based paint. According to EPA, in homes built between 1960 and 1978, approximately 24% have lead-based paint, as compared to 87% of the housing built before 1940.[34] Thus, without an improved EPA-recognized test kit, contractors presuming the presence of lead and employing lead safe work practices in homes built before 1940 will be correct 87% of the time. However, using the same presumption for homes built between 1960 and 1978 will result in the application of lead-safe work practices (and their added expense) where no lead is present 76% of the time.[35]

EPA originally proposed to implement the RRP in phases. Under its 2006 proposal, homes built before 1960 would be subject to the rule's requirements upon the rule's effective date, while work performed on homes built between 1960 and 1978 would have to meet the requirements one year later. Ultimately, EPA decided not to employ a phased-in approach in the final rule because it had

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[32] *Lead; Renovation, Repair, and Painting Program; Proposed Rule*, 71 Fed. Reg. 1588, 1628 (Jan. 10, 2006).
[33] *Id.*, at 1599.
[34] 73 Fed. Reg. 21712 (Apr. 22, 2008).
[35] 71 Fed. Reg. 1599 (Jan. 10, 2006).

received assurances from "potential test kit manufacturers" that a commercially available test kit satisfying both negative and positive criteria could be "accomplished in the near future."[36] Therefore, "[a]fter reviewing the comments and weighing all of the factors, ***including EPA's expectation that the improved test kits will be commercially available by September 2010***, EPA has decided not to include a phased implementation in this rulemaking."[37] (emphasis added)

However, recognizing the significant role the test kits would play in ensuring the feasibility and affordability of the RRP Rule, EPA qualified its decision, stating:

> "Nonetheless, if the improved test kits are not commercially available by September 2010, ***EPA will initiate a rulemaking*** to extend the effective date of this final rule for 1 year with respect to owner-occupied target housing built after 1960."[38] (emphasis added)

In 2008, EPA clearly envisioned a world in which improved test kits would be available by 2010. That expectation has not come to fruition. As a result, EPA's current RRP Rule will place onerous mandates on millions of renovation activities in homes that do not contain LBP in regulated levels. Because EPA's own data shows the presence of LBP is highly unlikely within these homes,[39] coupled with the significant economic impacts the RRP will impose, NAHB urges EPA to delay the RRP for homes built between 1960 and 1978 until the Agency recognizes a test kit capable of achieving the accuracy levels outlined in section 745.88(c). At a minimum EPA should delay the Rule's effective date for this subset of homes until April 2011, as it said it would in the preamble.

4. If an Improved Test Kit is not Available in the Foreseeable Future, EPA Should Consider Alternative Means to Achieve the Same Regulatory Objective.

EPA has developed and implemented the RRP Rule based in large part around the anticipated existence of a test kit with a 5% false negative and 10% false positive response. Indeed, EPA estimated that the economic impact of the RRP Rule would be reduced substantially once such an improved test kit was available. EPA was even able to forego other implementation options, such as a

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[36] 73 Fed. Reg. 21712 (April 22, 2008).
[37] *Id.*
[38] 73 Fed. Reg. 21713 (Apr. 22, 2008).
[39] EPA, *2008 Economic Analysis, at*, Chapter 4, page 19.

phased-in approach based on the age of the home, because the Agency believed that an improved test kit would soon be on the market, bringing down compliance costs in short order.

Now that it is clear that an improved test kit will not be available for the foreseeable future, EPA is urged under this petition to consider alternative regulatory options to bring the compliance costs back in alignment with original estimates. For example, when EPA was developing the 2008 RRP Rule it examined various policy options that were designed to reduce the overall economic burden on property owners and contractors. EPA's considerations included a phased-in approach based on the age of the home and the "opt-out" provision that was initially a part of the final RRP, but was rescinded shortly.

The Opt-Out allowed homeowners without children under six or pregnant women in residence the choice when hiring a remodeler to authorize their remodeler to not perform the lead-safe work practices. Under this system, the eligible consumers, after being provided the pamphlet *Renovate Right: Important Lead Hazard Information for Families, Child Care Facilities, and Schools*, were given the opportunity to choose for themselves whether to require the contractor to adhere to lead-safe work practices during the renovation. As discussed above, EPA estimated in its 2010 Economic Analysis that removing the Opt-Out would add 5.4 million LSWP renovation events in the first year to the 8.4 million LSWP events calculated for the 2008 RRP, for a total of 13.8 million LSWP renovation events. If EPA were to reinstate the Opt-Out, the number of LSWP events would decrease by approximately 40% – a reduction that approximates what would have been saved if an improved test kit were available.

NAHB strongly urges EPA to examine the breadth of options available to reduce the costs and burdens associated with the RRP Rule. At a minimum, NAHB urges EPA to reinstate the Opt-Out provision for homes built after 1960, where only 24% of homes contain lead-based paint. Under this scenario, compliance costs would be decreased, and the use of LSWPs would be focused on those homes with a higher probability of the presence of lead-based paint.

Conclusion

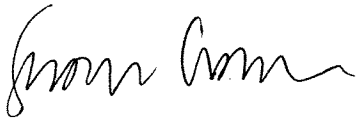
NAHB, like many stakeholders, is disappointed that an improved test kit is not currently available, and is hopeful that the technology is developed soon. Nevertheless, without an improved test kit, and in light of other recent amendments EPA has made or proposed to the RRP, the RRP is becoming

substantially more expensive and complex than ever envisioned.[40] Through this petition, NAHB requests that EPA:

1. Propose an amendment to the RRP to clarify that existing test kits may be used after September 1, 2010;
2. Revise the economic analysis and reconvene with OMB to ensure the costs of the rule are in line with the expected benefits and that the final rule is the most cost-effective alternative;
3. Delay the effective date of the RRP Rule for post-1960 homes until an improved test kit is recognized; and
4. Consider alternative regulatory options in order to reinstate the cost savings that would have resulted with the existence of a commercially available, improved test kit.

If you have any questions regarding NAHB's petition, please do not hesitate to contact me or Amy Chai, Senior Counsel, Legal Affairs, at (202) 266-8232 or achai@nahb.org.

Sincerely,



Susan Asmus
Senior Vice President

CC:

Steve Owens, Assistant Administrator, EPA Chemical Substances and Pollution Prevention
Maria J. Doa, Ph.D., Director, EPA National Programs Chemicals Division
Cass Sunstein, Administrator, Office of Information and Regulatory Affairs
Karen G. Mills, Administrator, U.S. Small Business Administration

[40] *See* Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program, 75 Fed. Reg. 24802 (May 6, 2010); *see also* Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program, 75 Fed. Reg. 25038 (proposed May 6, 2010).