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U.S. Environmental Protection Agency
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(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Section 610 Review of Lead-Based Paint Activities; Training and Certification for Renovation and Remodeling Section 402(C)(3) (EPA-HQ-OPPT-2016-0126-0001)

Dear Ms. Price and Mr. Shafer,

On June 9, 2016, the U.S. Environmental Protection Agency (EPA) announced [1] that it was initiating a review of the 2008 "Lead; Renovation, Repair, and Painting Program" (RRP) rule [2] under Section 610 of the Regulatory Flexibility Act.[3] EPA also stated that it will consider relevant comments on the RRP rule's 2010 [4] and 2011[5] amendments, as well as on lead test kits, field testing alternatives, and other broader concerns referenced in prior lead test kit RRP rulemakings.[6]

The Natio nal Association of Home Builders (NAHB) appreciates the opportunity to provide comments on this Section 610 review of the RRP rule. NAHB is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily residential construction, remodeling, multifamily ownership and management, building material trades, building products manufacturing and supply, and commercial and light indus trial construction projects. Over 95

[1] 81 Fed. Reg. 37,373 (June 9, 2016).

[2] 73 Fed. Reg. 21,692 (Apr. 22, 2008).

[3] 5 U.S.C. § 610.

[4] EPA, *Lead; Amendment to the Opt -Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*, 75 Fed. Reg. 24,802 (May 6, 2010).

[5] EPA, *Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program* , 76 Fed. Reg. 47,917 (Aug. 5, 2011).

[6] *See* EPA, *Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting; Notice of Public Meeting*, 80 Fed. Reg. 27,621 (May 14, 2015); EPA, *Lead; Renovation, Repair and Painting Program; Lead Test Kit; Notice of Opening of Comment Period*, 80 Fed. Reg. 79,335 (Dec. 21, 2015).

percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA). NAHB members collectively employ over 3.4 million people nationwide. Four out of every five new homes are built by NAHB members.

NAHB has a profound interest in ensuring that EPA performs a robust Section 610 review of the RRP rule. NAHB has been actively engaged in EPA's lead-based paint program for the residential sector since its inception a nd has been an advocate and supporter of the required training completion for its members. The RRP program impacts NAHB members in the field during the daily practice of their jobs. Throughout the program's development and implementation, NAHB has facili tated stakeholder engagement and provided ongoing input to EPA. The comments included in this letter are intended to supplement and expand upon comments made by NAHB in prior stakeholder meetings, comment letters, and administrative and judicial filings concerning the RRP program.

NAHB believes the RRP program, as it is currently being implemented, is an inefficient tool for achieving the environmental and health goals of the underlying statute and rule. Most importantly, the lack of a reliable, commercia lly available lead paint test kit means renovators must continue to apply lead -safe work practices in places where no lead -based paint hazard exists—making the program *more expansive and expensive* than EPA projected. Other aspects of the program, includin g the new renovator recertification requirements, add needless complexity to the rule's implementation and create an unnecessary bias against online training. NAHB urges EPA to use the Section 610 review process as an opportunity to revisit the rule's underlying cost assumptions and revise certain program design choices. This will ensure a better, more efficient program going forward.

OVERVIEW AND BACKGROUND

2008 Rule. On April 22, 2008, EPA published the final RRP rule "to address lead -based paint hazards created by renovation, repair, and painting activities that disturb lead -based paint in target housing and child-occupied facilities" built before 1978.[7] Among other provisions, the rule requires contractors to use lead -safe work practices during reno vation, repair, and painting activities that disturb lead -based paint in buildings covered by the program, *unless* a determination can be made that the building does not contain federally-regulated levels of lead-based paint.[8] To make this determination, a certified renovator could use an EPA -recognized lead paint test kit, if one were available. A qualifying test kit must meet two separate regulatory

[7] 73 Fed. Reg. at 21,692. "Target housing" is any housing constructed before 1978, with certain exceptions for housing for the elderly or disabled or any zero-bedroom dwelling.

[8] The standard is set at content levels that equal or e xceed 1.0 milligrams per square centimeter (mg/cm ^{2}) or 0.5 percent by weight. *See* 40 CFR § 745.82(a).

criteria: a negative -response criterion and a positive -response criterion.[9] At the time EPA finalized the 2008 rule, no available test kit met *both* of these criteria. But EPA felt "confident that improved test kits meeting both of EPA's benchmarks [would] be commercially available by September 2010."[10] In EPA's economic analysis for the rule, the agency assumed a qualifying test kit would become available in mid -2011.[11] Absent a recognized test kit, renovators had to assume that lead paint is present and, hence, apply lead-safe work practices.

2010 Amendment. In 2010, EPA amended the RRP rule to remove the "opt -out" provision that exempted renovators from the program's requirements if the homeowner certified that no children under age six or pregnant women were present in the home and the home was not a child-occupied facility. According to EPA's economic analysis for the 2010 amendment, eliminating the opt -out provision increased the number of pre -1978 homes affected by the program by approximately 40.2 million, effectively doubling the scope of the program.[12] The amendment made no change to the test kit requirements, or to EPA's assumptions about the availability of a test kit meeting both of the regulatory criteria. At the time, EPA "expect[ed] test kits that more accurately determine whether a painted surface qualifies as le ad-based paint [would] become available in late 2010."[13] The economic analysis again assumed a qualifying test kit would become available in mid-2011.[14]

2011 Amendment. In 2011, EPA amended the RRP rule to include, among other revisions, a provision allowing a certified renovator to use paint chip analysis (i.e., collecting a paint chip sample and sending it to a recognized laboratory for analysis) in lieu of a test kit.[15] As discussed below, the 2011 amendment has not provided renovators with any *practical* alternative to using

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[9] *See* 40 CFR § 745.88(c). These criteria relate to the probability of receiving false negative results and false positive results, respectively, when using the test kit.

[10] 73 Fed. Reg. at 21,712.

[11] *See* EPA, Office of Pollution Prevention and Toxics (OPPT) *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities* (March 2008) (2008 Rule Economic Analysis) at 4 ("EPA expects that improved test kits . . . will be commercially available by September 2010, but this analysis does not assume that the improved test kits will be in use until *the second year that all of the rule's requirements are in effect.*") (emphasis added).

[12] *See* EPA, Economic and Policy Analysis Branch Economics, Exposure and Technology Division OPPPT, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt -out and Recordkeeping Final Rule fo r Target Housing and Child Occupied Facilities* (April 2010) (2010 Amendment Economic Analysis) at ES 1 -2 ("There are 78 million target housing units and [child occupied facilities] . . . The 2008 [RRP] rule applied to 37.7 million target housing units and 0.1 million public and commercial buildings. About 40.2 million target housing units would be added to the regulated universe due to the elimination of the opt-out provision.")

[13] 75 Fed. Reg. at 24,811.

[14] 2010 Amendment Economic Analysis at ES4 ("[T]his analysis assumes that improved test kits will be in use starting in June 2011.").

[15] 76 Fed. Reg. at 47,918.

a test kit. (Indeed, the paint chip testing method existed at the time EPA was developing the 2008 rule. At that time, EPA evaluated and dismissed the method as infeasible and too expensive.)

2015 Congressional Directive. By 2015, no qualifying test kit had emerged. In response, Congress issued a directive in EPA's Fiscal Year 2015 Appropriations Act policy rider for EPA to "prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule."[16] Congress further ordered that "[i]f no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives."[17] In the summer of 2015, EPA held a stakeholder meeting on test kit issues, including the existing market for test kits and alternatives to lead -based paint field testing.[18] In late 2015, EPA o pened a new comment period on test kits and other field testing options, "as suggested" by the congressional policy rider. [19] This comment period closed in February 2016, and any resolution on these issues is outstanding.

As of this date —nearly five years a fter EPA initially assumed an approved test kit would be available—no such kit exists to help minimize the costs and other burdens of the RRP program on NAHB's members and homeowners.

SECTION 610 COMMENTS

EPA seeks comment on the following statutory factors:

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule;

(3) the complexity of the rule;

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[16] FY 2015 Consolidated and Further Continuing Appropriations Act. *See* Joint Explanatory Statement in the Congressional Record for P.L. No: 113-235.

[17] *Id.*

[18] *See* 80 Fed. Reg. at 27,623.

[19] 80 Fed. Reg. at 79,335. "Without proposing any regulatory amendments," EPA sought comment on a range of potential lead test kit and field testing options, including: proposing to eliminate the positive response criter ion; proposing to modify the positive response criterion; maintaining the current negative response and positive response criteria; proposing to provide reduced RRP certification training requirements for X-Ray fluorescence (XRF) technicians; and exploring any other lead-based paint field testing technology that would provide reduced costs for consumers, remodelers and families to comply with the RRP rule. *Id.* at 79,336.

(4) the extent to which the rule overlaps, duplicates, or conflicts with other Federal, State, or local government rules; and

(5) the degree to which the technology, economic conditions or other factors have changed in the area affected by the rule.[20]

As discussed below, NAHB is constrained in its ability to provide meaningful comment on all of these factors due to the way EPA has structured its Section 610 review. Nevertheless, NAHB offers the following comments.

1. EPA Must Perform a New Economic Analysis Because No Qualifying Lead Test Kit Has Entered the Market (Factor 5)

EPA must revise the RRP rule's econ omic analysis. This analysis was required as part of the process of adopting the RRP in 2008 and was updated to reflect subsequent amendments that placed greater burdens on NAHB members and other members of the regulated community. However, a central premise of the economic analysis, even in its revised form, has continued to be that an approved test kit would be available. Because the linchpin test kit still does not exist, the economic analysis must be updated.

EPA's obligation to realistically asses s the potential impacts of the RRP rule on the regulated community has several sources. First, Toxic Substances Control Act (TSCA) Section 2(c) directs EPA to consider the environmental, economic, and social impacts of new rules.[21] Second, Executive Order (E.O.) 12866 directs agencies to "assess all costs and benefits of available regulatory alternatives [to a proposed regulation], including the alternative of not regulating" and to "select those approaches that maximize net benefits."[22] Finally, the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to consider the impacts of regulations on small businesses, including "any significant alternatives . . . which accomplish th e stated objectives of applicable statutes and which minimize any significant economic impact . . . on small entities[.]"[23] Congress intended the Regulatory Flexibility Act "to encourage federal agencies to utilize innovative administrative procedures in dealing with individuals, small businesses, [and other small entities] that would otherwise be unnecessarily adversely affected by federal regulations . . . [and] to better enable [agencies] to

[20] *See* 5 U.S.C. § 610(b).

[21] *See* 73 Fed. Reg. at 21,701.

[22] William Clinton, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[23] 5 U.S.C. § 603(c); *see also Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, n.12 (D.D.C. 2012), *aff'd sub nom. Int'l Internship Program v. Napolitano*, 718 F.3d 986 (D.C. Cir. 2013) (noting that the Regulatory Flexibility Act "is concerned with a regulation's economic impact on a *substantial number* of small entities") (emphasis in original) (internal citation omitted).

tailor regulations to the size and resources of those who will be affected by them."[24] EPA can only fulfill the intent of Congress by accurately assessing the impacts of its rules on small businesses.

Moreover, Section 610 itself requires agencies to minimize the significant economic impacts of a rule on small entitie s as part of its periodic review.[25] Thus, Section 610 imposes a continuing obligation on EPA to minimize the impacts of the RRP rule on NAHB members and other members of the regulated community, consistent with the stated objective of the Residential Lead -Based Paint Hazard Reduction Act.[26] EPA can hardly discharge this duty without having an accurate understanding of what those impacts are.

EPA's economic analysis for the RRP rule has been flawed since the beginning. A 2012 Office of Inspector General (OIG) report faulted EPA for relying on "limited data" in developing cost and benefit estimates for the rule's underlying economic analyses.[27] One of EPA's key assumptions was that a qualifying test kit would enter the market. Because this never happened, EP A's analysis remains fundamentally flawed. This undermines the entire basis for the initial RRP rulemaking and subsequent amendments. EPA must go back and re -perform the economic analysis for the rule, now that the original analysis is known to be inaccurate.

As described above, EPA assumed that a qualifying test kit would be available by 2011.[28] EPA predicted this would reduce the number of RRP renovation events by almost half, from 8.4 million in the first year to 4.4 million in the second year.[29] As EPA recognized, "[b]ecause not all buildings

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[24] S. Rep. No. 96-878, 96th Cong., 2d Sess. (July 30, 1980).

[25] *See Warshauer v. Chao*, 2008 WL 2622799, at *33 (N.D. Ga. May 7, 2008), *aff'd sub nom. Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009) ("Under [Section 610], an agency must review its rules periodically to determine the effect of such rules on small entities and the need for such rules."); *In re Stock Exchanges Options Trading Antitrust Litig.*, 2001 WL 128325, at *n.4 (S.D.N.Y. Feb. 15, 2001), *aff'd*, 317 F.3d 134 (2d Cir. 2003) (An agency "is required to review those rules which have a significant economic impact upon a substantial number of small entities, in order to determine whether such rules should be continued without change, or should be amended or rescinded.") (internal citation omitted).

[26] 42 U.S.C. § 4851.

[27] The report further recommended that EPA re-examine those costs and benefits to determine whether the rule should be modified, streamlined, expanded, or repealed. *See* OIG, *Review of Hotline Complaint Concerning EPA's Lead-Based Paint Rule* (July 25, 2012). While EPA committed to gather addition al information on costs from the regulated community in *future* RRP rulemakings, including the public and commercial buildings rule, EPA declined to re-visit its economic analysis for the 2008 rule. *See* EPA, Office of Chemical Safety and Pollution Prevention, *Response to OIG Final Report on Hotline Complaint Concerning EPA's Lead Based Paint Rule, Report No. 12 -P-0600* (Oct. 22, 2012); EPA, Office of Chemical Safety and Pollution Prevention, *Response to Office of Inspector General Final Report No. 12-P-0600 "Review of Hotline Complaint Concerning EPA's Lead-Based Paint Rule, dated July 25, 2012* (Nov. 28, 2012).

[28] 2008 Rule Economic Analysis at 4; 2010 Amendment Economic Analysis at ES-4.

[29] 2008 Rule Economic Analysis at 4; 2010 Amendment Economic Analysis at ES-4 (Table ES-3).

built before 1978 have lead-based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule."[30] EPA projected a corresponding 50 percent decrease in the cost of the RRP program, from nearly $758 million in the first year to approximately $407 million in the second year.[31]

But no qualifying lead test kit ever entered the market that met both the negative-response and positive-response criteria. As of September 2016, only two approved test kits are available nationwide, but they meet *only* the negative-response criterion. This means they are likely to result in false positive readings, which deters both renovators and homeowners from using them. In December 2015, EPA acknowledged that the agency "is unaware of any lead test kit available *now or in the foreseeable future* that would meet *both* of the performance criteria." [32] More recently, EPA has indicated that a new test kit is under development and may reach the market in 2017, but few details have been provided.[33]

EPA has promised stakeholders a test kit since 2008 that has not been forthcoming. During that time, renovators have been compelled to use lead-safe work practices and take other steps that, in many instances, would not have been required if proper testing was available. Now, EPA is continuing its stalling tactic and suggesting that a new kit will be available soon, yet there is no indication that 2016 will be anydifferent than 2008 or any reason to believe that a qualifying test kit is likely to emerge in the near future. EPA must revisit and revise the RRP rule's economic analysis to correct the flawed assumption that a reliable and affordable EPA-recognized test kit would be available and significantly reduce the number of homes affected by the rule. A revised analysis would provide the agency, stakeholders, and general public with a more accurate understanding of the RRP rule's true costs and benefits and allow EPA to make more reasoned decisions regarding the rule's scope and requirements.

a. A revised economic analysis likely will show significantly higher costs than EPA originally projected.

The RRP program's true costs likely are significantly higher than what EPA originally projected. Because no qualifying test kit exists, EPA has no basis for the dramatic cost reduction assumptions

[30] 2008 Rule Economic Analysis at 3; 2010 Amendment Economic Analysis at ES-4.

[31] 2008 Rule Economic Analysis at 5; 2010 Amendment Economic Analysis at ES-4 (Table ES-3).

[32] 80 Fed. Reg. at 79,336 (emphases added).

[33] While one company publicly has commented that it has a qualifying test kit under development, NAHB notes that there is no certainty regarding the alleged test kit's current status, including when (or if) it would come to market. To the best of NAHB's knowledge, the company has not yet submitted required validation data to EPA. NAHB would be happy to see a qualifying test kit enter the market. But *even if* such a test kit enters the market in 2016 or later, it would not change the fact that EPA's economic analysis for the RRP rule assumed a qualifying test kit would be available in mid-2011, and that NAHB's members have been implementing the RRP program for the past six years *without* a technology EPA relied on in seeking to minimize the impacts the rule would have on small businesses.

underlying the RRP rule —i.e., that both the number of buildings covered by the program and total program costs would be reduce d by nearly half in the program's second year. In reality, renovators are "over -applying" the rule out in the field. Without a reliable test kit or realistic alternative, renovators working on pre -1978 homes or child -occupied facilities must either (i) assume lead-based paint is present or (ii) use an available test kit that is prone to "false positive" results. Both options can cause a renovator to apply lead safe work practices in buildings that do not present any actual lead -based paint hazard. Accor ding to the U.S. Department of Housing and Urban Development (HUD), only 24 percent of homes built between 1960 and 1977 contain lead-based paint.[34] This means that when renovators assume that lead is present in these pre -1978 homes, it is likely that *76 percent of the time renovators are applying the rule in a home never intended to be covered by the program* .[35] This over -application of the rule imposes significant costs on renovators and homeowners without any corresponding benefit.[36]

In addition, EPA never has fully accounted for state requirements or other factors that limit the use of test kits. For example, some states place additional restrictions on test kit use. In Illinois, RRP-certified renovators are required to bring in a state-certified third party to conduct any lead paint testing. Such requirements mean that *even if* a qualifying test kit enters the market, its mere availability may not reduce program costs to the extent EPA assumed, due to limitations on its use.

b. EPA should amend or rescind the rule if a revised economic analysis shows that costs exceed benefits.

EPA should amend or rescind part or all of the RRP rule if performing a revised economic analysis reveals that the program's costs exceed its benefits. Under E.O. 12866, agencies s hould only adopt regulations whose benefits exceed their costs. E.O. 12866 also orders agencies to base regulatory decisions "on the *best reasonably obtainable scientific, technical, economic, and other*

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[34] HUD, *American Healthy Homes Survey: Lead and Arsenic Findings* (April 2011) at 14 (Table ES -1), available at http://portal.hud.gov/hudportal/documents/huddoc?id=AHHS_Report.pdf.

[35] EPA included the opt-out provision in the 2008 RRP rule to help address this concern about over-applying the rule. The 2010 amendment removed this provision. NAHB urges EPA to revisit the issue of an opt -out provision. Reincorporating an opt-out provision into the rule would help ensure that the program is effectively targeting the at-risk population and not being applied where lead-based paint hazards are not present. At a minimum, NAHB urges EPA to consider reinstating the opt -out for homes built after 196 0 because the overwhelming majority of those homes do not contain regulated levels of lead-based paint.

[36] It also exposes the regulated community to unnecessary liability risks. Once a certified renovator presumes the presence of lead, all of the rule's requirements go into effect. Should EPA initiate an inspection, that inspector likewise will presume the presence of l ead. Thus, despite the fact that the rule's enforcement is intended to be limited to the *actual creation of lead -based paint hazards* , renovators may face lengthy and invasive federal investigations and significant fines *even when a lead -based paint hazard never existed*. This runs counter to the intent of the RRP program as a whole and the test kit provisions in particular.

information concerning the need for and consequences of the intended regulation."[37] The lack of a qualifying test kit calls into question whether EPA would have adopted the program as it currently exists at all.

Indeed, rather than basing the economic analysis of the RRP rule on existing technology, EPA included extremely optimistic cost projections based on *an elusive lead test kit that is yet to be developed*. It is unclear whether the benefits of the rule would still exceed the costs if EPA performed the analysis *without* the test kit assumption. If a rev ised economic analysis shows that the rule's costs exceed its benefits, EPA should amend or rescind part or all of the rule accordingly. The Section 610 review process is an opportunity for EPA to finally undertake the analysis of economic impacts it shou ld have undertaken at the start, and, if necessary, to revise its program design choices to help ensure that the program brings a net public benefit. In particular, EPA may need to reconsider its options for minimizing impacts on small businesses, such as reinstituting some form of the opt -out provision limiting the applicability of the rule to pre-1960 housing, revising the lead -safe work practices, and revisiting the training and recertification requirements.

2. EPA Should Address the RRP Program's Numerous Implementation Issues Previously Raised by NAHB (Factor 2)

NAHB previously has provided comments on and critiques of the RRP program —including the 2008 rule, its amendments, and related lead test rulemakings —in various comment letters, stakeholder meetings, and administrative and judicial filings. NAHB urges EPA to consider these previously raised concerns. The RRP program continues to be fraught with implementation issues, some of which have been present from the beginning and others which have e merged over time. NAHB highlights some of the major ongoing implementation issues below.

a. The new renovator recertification requirements are unnecessarily complex and burdensome.

EPA has set up a new renovator recertification system that is needlessly complex and burdensome. On February 17, 2016, EPA amended the RRP rule to, among other revisions, modify and streamline renovator refresher training requirements.[38] The amended rule sets up a new bifurcated recertification system with separate recertifica tion schedules based on whether a renovator takes a refresher training course *with* or *without* a hands-on component. This new recertification process is *far more complicated and cumbersome* than the process the agency originally proposed. In July 2016, NAH B filed with EPA a petition for reconsideration of the rule amendment, arguing that adopting this bifurcated approach (i) creates additional burdens for

[37] § 1(b)(7) (emphasis added).

[38] EPA, *Lead-Based Paint Programs; Amendment to Jurisdiction-Specific Certification and Accreditation Requirements and Renovator Refresher Training Requirements*. 81 Fed. Reg. 7,987 (Feb. 17, 2016).

renovators; (ii) contradicts the agency's goals by reinstating burdens it sought to avoid; and (iii) violates the Administrative Procedure Act because the agency did not give proper notice to the regulated community.[39]

NAHB urges EPA to initiate a rulemaking to repeal those provisions of the 2016 rule amendment establishing the bifurcated recertification system.[40] EPA should re-introduce its original proposal to eliminate the hands-on component as a required element of a refresher course. NAHB has long advocated removing the hands-on training from the refresher course because it imposes an unnecessary burden on certified renovators. Contrary to the agency's goals, the new recertification system is needlessly complex and does not encourage renovators to remain RRP certified. It is likely to reduce the overall number of certified renovators in the program.[41]

b. Individual certified renovators should be provided the same resources provided to certified firms.

EPA does not provide individual renovators with the same resources as certified firms. Nor does EPA provide the general public with the same level of information about individual renovators as certified firms. For instance,

- EPA's online search function for locating certified renovators[42] *only* provides information about certified firms and training providers. It does not provide information about individual renovators.

[39] NAHB, *Petition for Reconsideration on EPA's Final Rule: Lead-Based Paint Programs; Amendment to Jurisdiction-Specific Certification and Accreditation Requirements and Renovator Refresher Training Requirements* (July 5, 2016).

[40] Although EPA has not specifically solicited comment on this 2016 RRP rule amendment in the Section 610 review notice, the amendment poses serious RRP program concerns that relate to several of the required statutory factors, including the nature of complaints and comments received concerning the rule (factor 2) and the complexity of the rule (factor 3)

[41] Indeed, in March 2016, EPA reported that there were approximately 550,000 certified individual renovators. As of July 2016, this number had dropped to approximately 304,000 certified individual renovators (with just over 1,000 renovators taking the refresher training course without the hands-on component). This represents a nearly 45 percent reduction. *See* EPA, *US Environmental Protection Agency Regulatory Flexibility Act, Section 610 Review: Renovation, Repair & Painting Rule* , Presentation Slides from SBA Environmental Roundtable at 7 (Aug. 24, 2016). While some of the drop-off likely is attributable to other reasons (e.g., renovators now operating under a state-certified program), a significant portion likely is due to the complexity of the new refresher training/recertification requirements—especially in light of the large number of renovators whose certifications were set to expire on March 31, 2016. *See* EPA, *Lead-Based Paint Programs; Extension of Renovator Certifications*, 80 Fed. Reg. 20,444 (Apr. 16, 2015).

[42] *See* EPA, *Locate Certified Renovation and Lead Dust Sampling Technician Firms*, https://cfpub.epa.gov/flpp/pub/index.cfm?do=main.firmSearch (last accessed August 25, 2016).

- EPA allows certified firms to submit applications (for both certification and recertification), payments, updates, and certificate requests online.[43] Individual renovators do not have these options. Further, individual renovators who had their certifications extended via EPA's April 2015 final rule[44] had no means of receiving formal "extension" certificates. Instead, renovators were instructed to include a copy of the *Federal Register* notice with their certification paperwork. This created confusion and additional burdens for many NAHB members.

- EPA allows certified firms to order a copy of their certificate online.[45] Individual renovators do not have this option. This means that individual certified renovators have no centralized location from which to obtain a replacement certificate if needed. This has serious implications for individual renovators who obtained their original certificate from a trainer that is now out-of-business or otherwise unreachable.

NAHB appreciates EPA's efforts to develop website tools and other resources for certified firms. NAHB urges EPA to consider developing similar resources for individual certified renovators. This would help address some of the disparities between the burdens certified firms and individual certified renovators face, as well as the disparities in publicly available information. Overall, these changes would make the program more efficient and transparent, benefiting renovators and the public alike.

c. Regional disparity in recordkeeping protocols makes program compliance unnecessarily complicated.

EPA never has finalized a standardized recordkeeping form or established standardized protocols for filling out the sample form for renovators required to certify compliance with the RRP rule's training, work practice, and other requirements.[46] As a result, different regions maintain different protocols for filling out forms and maintaining records. For example, some renovators are allowed to "pre-fill" company information on the forms, while others cannot; some renovators are able to fill out all or portions of the forms online, while others must do so by hand. This regional disparity makes it difficult for NAHB to advise its members, who operate across many different regions and states, on the applicable protocols.

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[43] *See* EPA, *Apply for or Update Your Renovation Firm's Lead -Safe Certification Tod ay!*, https://www.epa.gov/lead/getcertified (last accessed August 25, 2016).

[44] 80 Fed. Reg. at 20,444.

[45] *See* EPA, *Lead Renovation/Abatement Firm Certification Application or Update* , https://www.epa.gov/lead/lead-renovationabatement-firm-certification-application-or-update (last accessed August 25, 2016).

[46] *See* 40 CFR § 745.86. EPA has provided a sample recordkeeping "checklist" form. *See id.* at § 745.86(c)(3). However, renovators are not required to use this form.

NAHB urges EPA to take steps to both (i) finalize a standardized recordkeeping form, by going through the full information collection request (ICR)/Office of Management and Budget (OMB) review process;[47] and (ii) establish a uniform set of protocols for filling out the form. Overall, standardized forms and protocols would simplify the program and eliminate burdens some renovators face in determining *how* they should satisfy the rule's recordkeeping requirements.

d. EPA Should Not Impose Quantitative Clearance Requirements

NAHB urges EPA not to amend the RRP rule to impose quantitative clearance test requirements. Doing so would exceed EPA's statutory authority, as the agency acknowledged in its decision in the 2011 RRP rule amendment not to promulgate testing and clearance requirements.[48] The RRP rule is intended to cover only lead-safe *renovation* activities, not lead *abatement* activities. Clearance testing activities fall under the statutory definition of "abatement" and thus are not properly considered renovation activities.[49] Even if EPA had authority to impose clearance testing requirements under the RRP rule, EPA should not do so because it would create additional and unnecessary implementation costs for an already burdensome, complex, and inefficient program. Moreover, EPA's own studies have affirmed that cleaning verification is sufficiently protective of public health.[50] Therefore, NAHB supports EPA's continued reliance on the "cleaning verification" process to ensure that regulated parties are following the RRP rule's requirements.

3. EPA's Section 610 Review Process is Deficient

EPA's Section 610 review process for the RR P rule is inadequate. The purpose of Section 610 review is to determine whether a rule "should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize

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[47] EPA issued a draft ICR on recordkeeping requirements in January 2006. *See* EPA, *Notice of Proposed Rulemaking of Le ad; Renovation, Repair, and Painting Program* , 71 Fed. Reg. 1,588 (Jan. 10, 2006); EPA ICR No. 1715.07. However, EPA never issued a finalized recordkeeping form in response to the ICR. NAHB urges EPA to issue a revised ICR on recordkeeping requirements.

[48] 76 Fed. Reg. at 47,920 (Aug. 5, 2011) ("The RRP work practices are, in essence, requirements to ensure that renovators undertake traditional renovation activities . . . in a lead -safe way. EPA believes the RRP rule effectively minimizes exposure to hazard s generated by renovation activities *without imposing practices and disciplines that are outside the scope of traditional renovation activities*.") (emphasis added). Further, "EPA*did not design or intend* the RRP rule to address cleanup of pre -existing dust-lead hazards." *Id.* (emphasis added). "EPA recognizes that imposing a clearance requirement would be a departure from the balance struck in the RRP rule with respect to the distinction between abatement and renovations." *Id.* at 47,922 (emphasis added).

[49] *See* 15 U.S.C. § 2681 (1)(B) (defining "abatement" as "all preparation, cleanup, disposal, and *postabatement clearance testing activities* associated with such measures") (emphasis added).

[50] EPA, *Lead Exposure Associated with Renovation and Remodeling Ac tivities: Environmental Field Sampling Study* (1997); EPA, *Characterization of Dust Lead Levels after Renovation, Repair and Paining Activities* (2007).

any significant economic impact upon a substantial number of . . . small entities."[51] When an agency publishes notice of a Section 610 review, it "shall include a brief description of [the] rule and the need for and legal basis of such rule and shall invite public comment upon the rule."[52] However, the manner in which EPA has structured this Section 610 review undermines the ability of interested members of the public to participate in the process in a meaningful way.

EPA has not provided sufficient notice to the regulated community to meet its Section 610 obligations. Although the statute requires only a "brief description" of the rule, EPA's notice for the RRP rule does little more than provide one-to-two sentence summaries of the rule and its various amendments and associated rulemakings. Only a single sentence appears (indirectly) to address the "need for" the rule.[53] There is no apparent attempt to explain the "legal basis" for the rule. Moreover, although not expressly required under the statute, EPA's notice gives no indication of the agency's *own* assessment of the RRP program, nor does it provide any of the agency's own analysis or data on the rule's implementation. Commenters cannot adequately respond to the five statutory Section 610 factors—beyond reiterating comments previously made to the agency—on the meager basis of what EPA has provided in the notice.

In short, EPA appears to be treating the Section 610 review process as a mere "check the box" exercise. For the Section 610 review process to be effective, NAHB urges EPA to withdraw the current notice and re-issue it with a report analyzing the rule's performance to which commenters can respond.[54] This should include EPA's assessment of the five statutory factors, as well as EPA's responses to previously submitted comments. The new notice also should clarify what information the agency seeks and how the agency intends to use the information it receives. At minimum, EPA should allow a second comment period after the agency prepares its draft report in response to the initial round of Section 610 comments.

This type of process would allow interested parties to provide more meaningful comments to EPA. Indeed, in the absence of the type of report suggested, members of the public would be unable to provide any meaningful comment on at least one of the statutory factors (the nature of comments received concerning the rule). EPA is the only entity that can meaningfully address this factor. This type of process would result in something closer to what Congress intended (i.e., a meaningful assessment of a rule and its impacts on small businesses in light of experience with implementation of the rule).

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[51] 5 U.S.C. § 610(a). An agency must document the review and conclusions within ten years of the date a rule was promulgated. *Id.*

[52] *Id.* at § 610(c).

[53] *See* 81 Fed. Reg. at 37,381 (defining the RRP rule in broad terms as "intended to reduce exposure to lead hazard created by renovation, repair, and painting activities that disturb lead-based paint").

[54] EPA has authority under Section 610 to amend its plan for reviewing a rule "at any time by publishing the revision in the *Federal Register*." 5 U.S.C. § 610(a).

In addition, EPA has not provided clarity about how this Section 610 review relates to the other ongoing stakeholder conversations regarding the RRP program. For instance, EPA states that the Section 610 review is "an additional opportunity" to comment on lead test kits, field testing alternatives, and unspecified "other broader RRP rule concerns." [55] NAHB does not believe that a Section 610 review is the appropriate place to continue the ongoing stakeholder conversation about test kits and lead testing alternatives. There is too much uncertainty as to how EPA will weigh information received (or *not* received, if stakeholders elect not to comment on the test kit issues[56]) via the Section 610 review process. It also is difficult to provide meaningful comment without feedback from EPA on prior comments submitted on these very same issues.

ADDITIONAL COMMENTS ON LEAD TEST KITS AND FIELD TESTING ALTERNATIVES

In addition to seeking comment on the Section 610 factors as they apply to the RRP rule, EPA is seeking broader feedback on lead test kits and field testing alternatives. As explained above, NAHB does not believe that a Section 610 review is the proper venue to continue the test kit stakeholder discussion. Nonetheless, NAHB offers the following comments on this critical issue.

1. There is no adequate existing field test alternative to lead test kits.

No existing lead test method can serve as an adequate substitute for a qualifying lead test kit. NAHB acknowledges that two alternative lead testing methods are available: paint chip testing and hand-held XRF testing. EPA evaluated both methods in developing the 2008 RRP rule, but dismissed these methods as infeasible and too expensive. Although EPA subsequently has approved both methods for use in the absence of a reliable test kit, renovators continue to face practical issues in using both methods.

First, paint chip analysis is not a field test. Once collected, the samples must be sent off to a certified laboratory for analysis. This causes project delays and increased costs. Additionally, certified renovators in some states (e.g., Illinois) are unable to conduct the paint chip sampling themselves and must schedule a third-party to come out and do the testing.

Second, while XRF analysis *is* a field test capable of providing immediate results, the method comes with several practical, economic, and regulatory barriers. These include certification and training requirements to operate the XRF testing device, capital investment in the XRF equipment, and delays from not having enough XRF devices and certified staff to perform timely testing at all potential job sites.

Neither paint chip analysis nor XRF analysis can serve as a functional equivalent to the quick, affordable, and reliable test kit method envisioned by EPA under the RRP rule. Further, both

[55] 81 Fed. Reg. at 37,381.

[56] EPA should not treat silence on any issue as an indication of satisfaction with the status quo.

methods would require renovators to meet addition al training and certification requirements and/or rely upon third parties to perform lead testing. Putting such burdens on the regulated community serves as a disincentive to comply and runs contrary to EPA's original intent under the RRP rule.

2. EPA should limit the scope of the program to pre-1960 housing stock.

To help address the problems created by the lack of a reliable and practical lead paint testing method, EPA should limit the scope of the RRP program to homes built before 1960.[57] Pre-1960 homes are more likely to contain lead-based paint than homes built between 1960 and 1977. As described above, including 1960-1977 housing stock in the program results in "over-application" of the program. This leads to wasted time, effort, and money undermining the program's ability to target resources where they are most needed. Higher renovation costs also create risks for homeowners by encouraging them to put off needed renovations, take on renovations themselves (without any of the protections provided by th e RRP rule), or turn to uncertified contractors (again, without the rule's protections). NAHB urges EPA to narrow the rule's scope to cover only those homes most likely to contain lead-based paint and most likely to present an exposure risk to young children or pregnant women. Re-targeting the program will help ensure that the program works better in the future, not only for certified renovators but also for the clients and communities they serve.

CONCLUSION

NAHB appreciates the opportunity to comment on EPA's Section 610 review of the RRP rule—a rule with major real-world impacts for NAHB members. The demonstrably inadequate nature of EPA's original assessment of the economic impacts of the RRP rule on small businesses—and, therefore, the agency's flawed evaluation of how to minimize these impacts—as well as EPA's current obligation under Section 610 to assess the impacts of the rule cry out for a robust analysis of the RRP rule and its impacts on small businesses that does not rely on the unfounded hope that an adequate test kit will shortly be forthcoming.

To ensure a robust review, NAHB requests that EPA amend its Section 610 review plan for the RRP rule to provide better notice and clearer guidance to stakeholders. Should EPA proceed with the current Section 610 review plan, NAHB urges EPA to perform a revised economic analysis of the RRP rule (that does not assume a qualifying lead paint test kit will become available) and amend or rescind part or all of the rule accordingly. Further, NAHB encourages

[57] In the preamble to the 2008 rule, EPA made a commitment that "if the improved test kits are not commercially available by September 2010, EPA will initiate r ulemaking to extend the effective date of this final rule for 1 year with respect to owner-occupied target housing *built after 1960*." 73 Fed. Reg. at 21,713 (emphasis added). That time has come and gone, and EPA has failed to live up to its commitment. However, the Section 610 review process presents a new opportunity for EPA to examine the real-world implications of this failure and to look toward practical fixes to reform the program moving forward.

EPA to implement the other changes described in these comments to make the program more efficient and effective going forward.

NAHB stands ready to continue to work with EPA during this Section 610 review process and welcomes any opportunity to participate in follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve, reduce unnecessary regulatory burdens, and eliminate unintended consequences without undermining program effectiveness and integrity or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 266-8327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,

Tamra Spielvogel
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July 6, 2015

James Jones, Assistant Administrator
United States Environmental Protection Agency
Office of Chemical Safety and Pollution Prevention.
1200 Pennsylvania Ave. N.W., (7101M)
Washington, DC 20460

(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting; Notice of Public Meeting (EPA–HQ–OPPT–2005–0049)

Dear Assistant Administrator Jones,

On May 14, 2015, U.S. Environmental Protection Agency (EPA) published a notice of public meeting in the *Federal Register* announcing a "Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting." [1] Acting in response to a Congressional directive EPA is seeking information related to:

1) The existing market for lead test kits as referenced in the 2008 Lead; Renovation, Repair and Painting Program rule;

2) The development or modification of lead test kit(s) that may meet the EPA's positive -response criterion (in addition to the negative -response criterion); and

3) Other alternatives for lead-based paint field testing.

The National Association of Home Builders (NAHB) appreciates the opportunity to provide comments on this important issue. The comments included in this letter are intended to supplement and expand upon those comment s made by NAHB member and former NAHB Remodelers Chair Bob Hanbury at the June 4, 2015 public meeting.

NAHB is a Washington, D.C. -based trade asso ciation representing over 140,000 builder and associate member firms that are organized inmore than 700 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. The organization's membership includes those wh o design, construct, and supply single - family homes; build and manage multi -family, light commercial, and industrial structures; develop land; and remodel existing homes.

Over 80 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA), 55,000 NAHB members indicate they are involved in remodeling, and NAHB members collectively employ over 3.4

[1] 80 *Federal Register* 27621-27623 (May 14, 2015)

million people nationwide. Collectively, NAHB's members will construct about 80% of the new housing units projected for 2015.

Overview

On April 22, 2008, EPA published the final rule for the Lead-Based Paint Renovation, Repair and Painting (RRP) program. This regulations established requirements, effective April 22, 2010, that contractors use lead -safe work practices during renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978 unless a determination can be made that no lead-based paint would be disturbed during the renovation or repair. Among other provisions outlined in the 2008 rule, it was established by EPA that an EPA-recognized lead test kit, when used by a certified renovator, could be used to reliably determine whether federally regulated levels of lead-based paint is present. If regulated levels of lead-based paint[2] is not present there is no requirement to employ lead -safe work practices under the RRP rule. The rule was amended in 2010 by EPA when, among other provisions, the opportunity to opt-out was removed from the program. The opt-out allowed homeowners to affirmatively opt-out of the requirements of the RRP program when no children under six or pregnant women were present in the target housing under renovation . Elimination of the opt -out provision affected 39,886,000 units, according to the economic analysis prepared by EPA and resulted in the RRP rule covering millions of additional pre-1978 homes that were not previously subject to the rule. The 2010 amendments made no change to the use of the lead test kit or the assumptions EPA made regarding the ability to bring to market a commercially available, reliable, affordable lead -test kit that met all of the regulatory required criteria.

At the time the 2008 rule was finalized no available test kit met the criteri a established by EPA under the regulation. Under 40 CFR 745.88(c) for a lead test kit to be recognized by EPA it must meet separate negative -response and positive -response criteria which essentially relate to the probability of receiving false negative results and false positive results when using the test kit.

- 40 CFR 745.88(c)(1). The negative-response criterion states that for paint containing lead at or above the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a negative response less than or equal to 5% of the time must be met.

- 40 CFR 745.88(c)(1)-(2). The positive-response criterion states that for paint containing lead below the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a positive response less than or equal to 10% of the time must be met.

To date, there are only two lead test kits recognized by EPA and available nationwide and both have only met the negative-response criterion. EPA stated that this recognition will remain in effect until EPA announces recognition of the first test kit that meets both criteria established in the rule.[3] Under the regulation, all lead test kits recognized after September 1, 2010 must meet both the negative-response and positive-response criteria.

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[2] The standard is set at content levels that equal or exceed a level of 1.0 milligram per square centimeter (mg/cm2) or 0.5 percent by weight.

[3] http://www2.epa.gov/lead/lead-test-kits (accessed July 1, 2015)

The lack of a test kit meeting both response criteria was reflected in the required economic analysis which was prepared when the original regulations for the program were being finalized in 2008 and again when the program was amended in 2010. In both cases, the agency recognized that a test kit satisfying both criteria would not be available in the first year the rule was effective. However, EPA assumed that in year two of the program a qualified, recognized test kit would be available and on the market. Indeed, EPA estimated that the number of RRP renovation events would be reduced by almost half, from 8.4 million in the first year to 4.4 million in the second year, solely because of the availability of a qualified test kit.[4] EPA also projected a significant decrease in the cost of the RRP program from $758 million in the first year to $407 million in the second year.[5] Similar, though not identical, language was included in both analyses explaining EPA's assumptions:

> Because not all buildings built before 1978 have lead-based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule. Currently available test kits for detecting whether lead-based paint is present have a high false positive rate resulting in the frequent use of lead safe work practices when they are not necessary, i.e., when lead-based paint is not present. 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.[6]

NAHB has been actively engaged in EPA's lead -based paint program for the residential sector since its inception and has maintained a commitment over time to program implementation including consistently advocating on behalf of the remodeling industry on th e importance of obtaining and maintaining the required training and certification under EPA's RRP rule. In line with that commitment, NAHB has repeatedly raised concerns over the practical implications for the program resulting from the fact that a reliabl e pre-renovation test kit that can be used to determine if regulated levels of lead are present, as defined, on painted surfaces in pre -1978 structures has never been brought to market. In fact, EPA itself eloquently summarized the need for test kits in the announcement for the June 4th public meeting stating "lead test kits recognized by EPA should also serve as a quick, inexpensive, reliable, and easy to perform option for lead -based paint testing in the field."[7]

In June 2013, NAHB met with EPA to discussongoing work related to recognition of lead test kits. In a July 31, 2013 response letter to NAHB , EPA clearly stated that the agency would make no additional commitment of resources to foster the development of a test kit that would meet both the false negative and false positive criteria outlined in the RRP rule; nor would EPA provide any additional support for test kit research and d evelopment efforts by private companies. NAHB understands the fiscal constraints EPA has faced and the technical limitations that have limited

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[4] U.S. Environmental Protection Agency, (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*
[5] *Id.*
[6] U.S. Environmental Protection Agency, (2010). *Economic Analysis for the LRRP Opt-Out and Recordkeeping Final Rule.*
[7] 80 *Federal Register* 27623 (May 14, 2015)

advancements in developing a viable test kit. However, the decision by EPA to relinquish responsibility for a key component of the program on which the EPA economic analysis and subsequent program design choices were founded remains troubling.

As a result of EPA's decision, the RRP rule is increasingly applied to buildings that may otherwise have been excluded from the scope of the rule by a test kit that can accurately reflect the presence of regulated levels of lead-based paint. Without a reliable test kit, certified renovators must either assume lead-based paint is present and apply lead safe work practices, or use an EPA approved test kit with the knowledge that the results are likely to be inaccurate. Ultimately, renovators and their customers are left assuming the burden of additional costs and requirements associated with the rule – all without the reassurance that these burdens address a lead-based paint hazard.

Ensuring a structurally sound regulatory program that accurately reflects the on the ground realties faced by the remodeling industry will ultimately result in a more robust program overall. As it is currently being implemented the program is an inefficient tool for achieving the environmental and health goals of the underlying statute and regulation. The use of time, resources, and capitol on RRP renovation jobs that could otherwise have been deemed outside the rule's scope of coverage undermines the programs ability to target resources where they are most needed. The increased costs of these renovation jobs can also contribute to homeowners increasing their risk by putting off needed renovations, taking them on themselves or turning to uncertified contractors acting in violation of the rule.

As the representative from the U.S. Department of Housing and Urban Development raised during his statement at the public meeting, the lack of a test kit satisfying the RRP's requirements undermines the government's ability to meet both its responsibility to protect the health of the public and be good fiduciary stewards of the money it is entrusted to oversee. While he spoke in his role as a public servant, the same can be said for the relationship between renovators and their clients and paints a clear picture as to why the lack of a commercially available, reliable, affordable lead-test kit is such a concern for the remodeling industry.

Economic Analysis

The lead test kit status quo has concerned NAHB for many years as the economic analysis of the RRP rule conducted in 2008 for the final rule and for the 2010 amendments was predicated on the fact that a reliable, affordable field test kit would be available on the market in year two of the program. While some stakeholders will argue that the cost effectiveness of the testing option is not EPA's concern, under both the statute, existing Executive Orders, and related guidance documents EPA is required to be concerned with the cost effectiveness of the rule. First, as EPA has clearly acknowledged in the regulatory preamble to the 2008 final rule, the agency "as directed by TSCA section 2(c), considered the environmental, economic, and social impact of this rule."[8] In addition, the regulations for the RRP program have consistently been subject to interagency review under Executive Order(E.O.) 12866. Under E.O. 12866, "Regulatory Planning and Review,"[9] each agency is to identify and assess available alternatives to direct regulation and alternative forms of regulation to reduce costs and burdens.Agencies must also assess the costs and benefits of proposed regulations and only adopt those whose benefits justify their costs. Importantly, E.O. 12866 also requires agencies to base regulatory decisions "on the best

[8] 73 *Federal Register* 21701 (April 22, 2008)
[9] 58 Fed. Reg. 51,735 (Sept. 30, 1993).

reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation."[10]

Furthermore, EPA was so confident that an improved test kit would be in use by the second year of the program th at in the preamble to the final rule in 2008 the Agency committed that "if the improved test kits are not commercially available by September 2010, EPA will initiate rulemaking to extend the effective date of this final rule for 1 year with respect to owner -occupied target housing built after 1960."[11] Quite obviously that time has come and gone and EPA has failed to hold up its commitments t o the regulated community. However, five years later the opportunity exists, through stakeholder engagement such as this, to examine what the real world implications of this failure have been and to look toward practical fixes to reform the program movingforward.

Existing Alternatives Can't Substitute For Lead Test-Kit

NAHB acknowledges that two additional testing methods currently exist but would remind EPA that both methods also existed at the time the rule was first being developed. The two testing options are hand held XRF testing and the submitting of paint chip samples for subsequent chemical analysis by an EPA accredited laboratory under the National Lead Laboratory Accreditation Program (NLLAP). NAHB continues to believe that neither of these two e xisting lead-based paint testing methods serves as substitutes for the reliable, affordable lead -based paint test kit that this rule was predicated on. Furthermore, EPA evaluated and dismissed both of these existing lead-based paint testing methods as both infeasible and too expen sive during the development of the original RRP rule for compliance with the rule. While both have subsequently been approved for use in the absence of a reliable test kit the practical issues renovators face when contemplating the use of either an XRF or paint chip analysis to test for the presence of lead-based paint illustrate why they cannot serve as a direct substitute for the test kit.

Paint chip analysis is not a field test. Once collected the samples must be sent off to a certified laboratory for an alysis costing the consumer money in the form of project delay and preventing the certified renovator from legally beginning work . Meanwhile, while XRF analysis can at least provide immediate results in the field there remain several practical, economic, and even regulatory barriers that will prevent XRF testing from ever serving as an equivalent tool to the quick, affordable, and reliable lead t est-kit envisioned by EPA under the final RRP rule. For example, in looking specifically at XRF testing the addition al costs , whether absorbed by a company directly or through contracting with an outside firm , can include meeting requirements for additional certification and training to operate the XRF testing device, capital investment in the XRF equipment, and the obvious delays resulting from a certified renovator having significantly more potential job sites requiring lead-based paint testing than available XRF devices and certified staff to operate the testing device. All of these factors contribute to the result that neither XRF nor paint chip analysis can serve as a functional equivalent of the lead test-kit as envisioned by the original rule. Finally, it would be contrary to the agency's original intent under the rule to require certified renovators to rely upon lead testing methods which they cannot perform themselves without subsequent training and certifications from both EPA and the states.

A Practitioner's Quagmire

For some renovators restrictions on the use of the test kits already exist at both the state and federal level due in part to the questionable reliability of the test kits. For others, operating in states such as Illinois, it is illegal for the RRP certified renovator to be the one testing for the

[10] *Id.* § 1(b)(7).
[11] 73 *Federal Register* 21713 (April 22, 2008)

presence of lead and they must bring in a state certified third party to do any testing. Couple all this with the broader regulatory and market constraints associated with other testing options (e.g. XRF) and most certified renovators are left with limited choices in the field.

Furthermore, homeowners subject to 1018 disclosure requirements must also grapple with the uncertainty of test kits. Despite the questionable reliability of the lead test kits homeowners must disclose any known results when they go to sell their property . While EPA and HUD have also encouraged homeowners to disclose information about the reliability of the tests the prospects of a false positive reading elevates concern for homeowners. As a result, the decision to act under the presumptive presence of lead may also be driven by the clients themselves faced with the lack of a test kit that meets both the positive and negative criteria of the regulation.

The resulting quagmire practitioners' face is that without a reliable, affordable field test kit or a cost competitive realistic alternative the most "reasonable" choice available has been to act under the presumptive presence of lead. I n other words, for any home or child occupied facility built before 1978 the renovator chooses to apply the requirements of the RRP rule despite the possibility that no lead-based paint is present. As a result, certified renovators are over applying the rule increasing the number of RRP events beyond any reasonable estimates for the program and creating an unnecessary burden on their businesses and their clients. According to EPA, as illustrated in Figure 1, 24 percent of homes built between 1960 and 1977 c ontain lead-based paint. As a result, when renovators act under the presumptive presence of lead in dealing with this segment of housing stock that means that 76 percent of the time the rule is likely being applied in a home never intended to be covered by the RRP rule. Applying this rule in such a manner doesn't serve to provide the desired health benefits or mitigate a hazard to pregnant women or children under 6 and goes well beyond the scope and intent of the statute and the regulation. In fact the opt-out was originally included by EPA in the 2008 rule to help address this concern of over application of the rule.

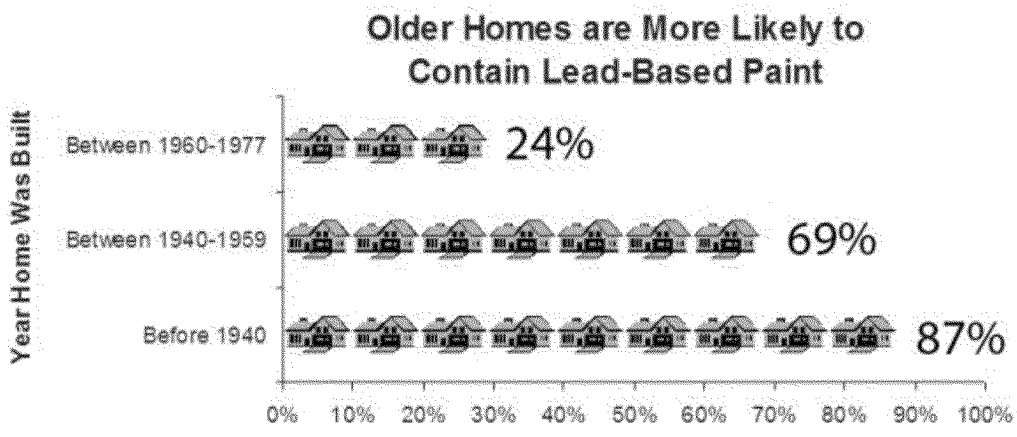

Figure 1[12]

In addition, acting under the presumption of presence not only results in an over -application of the rule increasing regulatory costs and reducing the efficiency and efficacy of the rule but it also opens up the regulated community to unnecessary liability concerns. Once a certified renovator presumes the presence of lead, then all requirements of the rule go in effect. Should EPA initiate an inspection, that inspector will likewise presume the presence of lead. Thus, despite the fact

[12] http://www2.epa.gov/lead/protect-your-family#sl-home (accessed on May 5, 2015)

that TSCA enforcement of the RRP rule is limited to actual creation of lead-based paint hazards[13], renovators may endure lengthy and invasive federal investigations and be forced to pay thousands in fines even though a lead-based paint hazard never existed.

The renovator will be subject to record keeping and work practice requirements equivalent to a work site where lead paint is known to be present and if an enforcement action is taken there will be no difference between the two sites. The potentially burdensome enforcement weight the regulated community finds itself voluntarily assuming because of a flawed regulatory structure runs counter to the intent of the test kit provisions and the design of the program as assumed in both the 2008 and 2010 economic analyses.

June 4, 2015 Stakeholder Meeting

NAHB is encouraged by the initiation of the stakeholder dialogue called for by Congress in the report language accompanying the FY 2015 Consolidated and Further Continuing Appropriations Act:

> The Agency is directed to prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule. If no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives.[14]

In addition, NAHB appreciates the ongoing nature of this dialogue and the opportunity to offer additional thoughts on issues raised at the June 4th meeting. While all federal lead based paint programs are ultimately moving to the same end – mitigating the hazards presented by exposure to lead based paint – they are by design very different programs. These programs are carried out by different agencies, under varying regulatory constraints and targeting different segments of the regulated community.

Regulated Level of Lead

The establishment of the regulated level of lead at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[15] Provisions were made to provide the Secretary of Housing and Urban Development (HUD) and the EPA Administrator with the ability to modify that level through regulation. However, only HUD can modify the regulated lead level as it applies to target housing units. As such, it is beyond the scope of EPA's current efforts to consider a change in the definition of lead-based paint for the purposes of the RRP program.

Despite this regulatory authority, HUD has taken a different approach and focused on funding research into test kits that would meet both the false positive and false negative criteria using the established regulated level of lead. Testimony was provided during the public meeting on June 4, 2015 from a HUD-funded company working to adapt existing test kits to address the issues that arise due to their sensitivity to the presence of lead in paint at levels well below the regulated level. NAHB commends HUD for its continued commitment to research despite the 2013 decision by EPA to end its research on lead test kits.

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[13] 15 U.S. Code § 2682(c)(3)
[14] Joint Explanatory Statement in the Congressional Record for P.L. No: 113-235
[15] P.L. 102-550

Renovation is not Abatement

Furthermore, at the June 4th meeting the discussion of the regulated level of lead was extended to also include the concept that EPA should examine whether RRP requirements be applied in situations where lead-based paint is present at lower than regulated levels. To do so would blur the line between the concepts of renovation, covered under RRP, and abatement, covered under separate EPA regulations. Under 40 CFR § 745.83 the term renovation is defined for the purposes of establishing the scope of covered activities under the RRP program. The regulation states that "[r]enovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223)." Through the establishment of this distinction, EPA clearly differentiated renovation activities from abatement activities speaking to the difference in intent, practice, and outcome associated with the two different types of activities. This distinction is critical given the presumption by some stakeholders that an examination of the test kit issue can and should result in a reexamination of the very foundation of this program.

EPA itself, in the preamble to the 2008 regulation, stated that "EPA is not interested in teaching persons how to be painters, plumbers, or carpenters. Rather, EPA's objective is to ensure that persons who already know how to perform renovations perform their typical work in a lead-safe manner."[16] As such, requiring RRP compliance when lead-based paint is present at lower than regulated levels would go beyond the scope of the current Congressional directive, would alter the foundation of the program, and exceed the statutory authority provided to the agency under 402(c)(3) of the Toxic Substances Control Act (TSCA).

While these are only two examples of items raised during the meeting NAHB would urge EPA to be extremely cautious in expanding the scope of the current undertaking. NAHB's recommendations have been narrowly tied to the absence of the test kit, a component of the regulation, and the potential remedies that may be a means of achieving the goals it was originally aimed at providing. While the inclusion of a yet to be developed technology in regulation can drive technological innovation that clearly has not occurred to date with regards to the RRP lead test kits. EPA should not sit back and ignore the reality of program implementation and the unintended consequences of what happens when practitioners must act absent that necessary technological innovation.

Next Steps

While NAHB applauds HUD for continuing research on test kits, and is pleased to see EPA seek stakeholder input, it is clear that a test kit meeting the Rule's requirements will not be available for the foreseeable future. In order to provide all parties with an adequate understanding of the RRP Rule's true costs and benefits, NAHB urges EPA to revisit and revise the economic analysis developed for the program. The Agency's original economic analysis for the RRP rule was predicated on a faulty assumption that presumed a commercially available, reliable, and affordable lead-based test kit that met the regulatory criteria would be available in year two of the program. In fact EPA estimated that once reliable test kits were available in the second year of the rule's implementation, the number of work sites covered by the rule would be cut in half.[17]

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[16] 73 *Federal Register* 21701 (April 22, 2008)
[17] U.S. Environmental Protection Agency. (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*

In reality, the lack of reliable test kits which meet both the positive and negative criteria as outlined in the 2008 RRP regulation calls into question EPA's original economic analysis upon which the requirements for the rule were based. Furthermore, the fact that the economic analysis for both the original 2008 regulation and the 2010 amendment were both predicated on this assumption undermines the validity of the data presented to the Office of Management and Budget during review of the rules under E.O. 12866. As such, it calls into question whether the program as it currently exists would have been adopted if the economic analysis would have been based on existing technology and not the development of an elusive test kit yet to be developed.

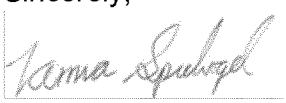
NAHB urges EPA to initiate as expeditiously as possible a review and revision of the economic analysis. A new economic analysis of the Residential RRP regulation should be conducted separate from actions EPA is undertaking in relation to other rulemaking proceedings and should take into account the underlying environmental, health and economic impacts of the RRP program. NAHB urges EPA to consider the adoption of measures that limit the scope of coverage and ensure that the estimated number of RRP events is more reflective of the goals and intents of the program. For example, EPA could limit the scope of housing stock covered by the regulation to homes built before 1960 which have a greater likelihood of containing lead-based paint. Furthermore, EPA could revisit the issue of an opt-out or other regulatory alternatives to ensure that the rule is effectively targeting the at risk populationidentified in the regulatory hazard finding avoiding application of the RRP program where lead-based paint hazards are not present.

The program as it is currently being implemented cannot efficiently target the underlying environmental and health goals it was established to meet. To address this deficiency EPA should act to narrow the targeted scope of the rule to cover those homes most likely to contain lead-based paint and those most likely to present an exposure risk to children under 6 or pregnant women. By effectively retargeting this program through an accurate economic analysis and a realistic evaluation of available tools and resources EPA will ensure that the RRP program moving forward works better for not only the certified renovators operating within the program but also for the clients and communities they serve.

Thank you for your consideration. NAHB staff and its members stand ready to work with EPA during the entirety of this stakeholder outreach process and welcome any opportunity to participate in individual follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve the program, reduce unnecessary regulatory burdens and eliminate unintended consequences without undermining the effectiveness and integrity of the program or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 266-8327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,



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February 19, 2016

James Jones, Assistant Administrator
United States Environmental Protection Agency
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1200 Pennsylvania Ave. N.W., (7101M)
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(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Lead; Renovation, Repair and Painting Program; Lead Test Kit; Notice of Opening of Comment Period (EPA–HQ–OPPT–2015–0780)

Dear Assistant Administrator Jones,

On December 21, 2015, U.S. Environmental Protection Agency (EPA) published a notice in the *Federal Register*[1] opening a second comment period to allow for further public comment in response to EPA's Fiscal Year 2015 Appropriations Act policy rider.

Specifically EPA is soliciting comment on the following potential lead test kit and field testing options raised by stakeholders during the initial comment period which opened on May 14, 2015 and included the June 4, 2015 public meeting.[2]

- Proposing to eliminate the positive response criterion;
- Proposing to modify the positive response criterion;
- Maintaining the current negative response and positive response criteria;
- Proposing to provide reduced Lead Renovation, Repair and Painting Prog ram training requirements for X-Ray Fluorescence technicians; and
- Exploring any other lead -based paint field testing technology that would provide reduced costs for consumers, remodelers and families to comply with the RRP rule.

The National Association o f Home Builders (NAHB) appreciates the opportunity to continue provide comments on this important issue. However, NAHB is concerned that most of the potential options EPA is currently requesting comment are neither new, innovative or truly provide a solution to the underlying problem. The comments included in this letter are intended to supplement and expand upon those comments already made by NAHB member and former NAHB Remodelers Chair Bob Hanbury at the June

[1] 80 *Federal Register* 79335-79336 (December 21, 2015)
[2] 80 *Federal Register* 27621-27623 (May 14, 2015)

4, 2015 public meeting and in the subsequent comment letter NAHB submitted for the record on July 6, 2015. In addition, NAHB wishes to incorporate by reference NAHB's prior comments on this matter submitted on July 6, 2015.

NAHB is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily residential construction, remodeling, multifamily ownership and management, building material trades, building products manufacturing and supply, and commercial and light industrial construction projects.

Over 95 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration, and NAHB members collectively employ over 3.4 million people nationwide. Four out of every five new homes are built by NAHB members. NAHB members are involved in the development and construction of for-sale single family homes for first-time and low- and moderate-income homebuyers, as well as the construction, ownership and management of multifamily rental housing, including affordable rental housing. NAHB's members and their activities are also subjected to numerous laws, regulations and policies issued and enforced at the federal, state and local level.

BACKGROUND & OVERVIEW

On April 22, 2008, EPA published the final rule for the Lead-Based Paint Renovation, Repair and Painting (RRP) program. The RRP rule requires contractors follow EPA prescribed lead-safe work practices during renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978, unless a determination can be made prior to the renovation or repair, that no lead-based paint would be disturbed. Under the RRP rule a certified renovator using an EPA-recognized lead test kit, could reliably determine whether or not federally regulated levels of lead-based paint is present in a given work area. Under the final RRP rule if regulated levels of lead-based paint[3] are not present, then none of the lead-safe work practices requirements, pre-renovation distribution of EPA's notification pamphlet, post work documentation by a certified renovator of the performance of lead safe work practices, and recording keeping requirements apply. The rule was amended in 2010 by EPA when, among other provisions, the opportunity to opt-out was removed from the program. The opt-out allowed homeowners to affirmatively opt-out of the requirements of the RRP program when no children under six or pregnant women were present in the target housing under renovation. Elimination of the opt-out provision affected 39,886,000 units, according to the economic analysis prepared by EPA and resulted in the RRP rule covering millions of additional pre-1978 homes that were not previously subject to the rule. The 2010 amendments made no change to the use of the lead test kit or the assumptions EPA made regarding the ability to bring to market a commercially available, reliable, affordable lead-test kit that met all of the regulatory required criteria.

To date, there are only two lead test kits recognized by EPA and available nationwide and both have only met the negative-response criterion. According to the *Federal Register* notice announcing the current comment period, "Based on stakeholder input, EPA is unaware of any lead test kit available now or in the

[3] The standard is set at content levels that equal or exceed a level of 1.0 milligram per square centimeter (mg/cm2) or 0.5 percent by weight.

foreseeable future that would meet both of the performance criteria."[4]

In acknowledgement of the current status of the test kit, Congress directed EPA ". . . to prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule. If no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives."[5]

As noted by EPA, "The use of an EPA -recognized lead test kit, when used by a trained professional, can reliably determine that regulated lead-based paint is not present by virtue of a negative result."[6] This has been the intent of the lead test kit since the original regulations for the program were finalized in 2008. As EPA so eloquently summarized in the announcement for the pub lic meeting "Qualitatively speaking, lead test kits recognized by EPA should also serve as a quick, inexpensive, reliable, and easy to perform option for lead-based paint testing in the field."[7] This ability, to determine in the field, whether lead-based paint is present at federally regulated amounts is an essential component of a functioning RRP rule, since there is no requirement under the RRP rule to employ lead -safe work practices if lead-based paint is not present in the work area at levels regulated by EPA/the federal government.

Absent the availability of a commercially available, reliable, affordable lead -test kit certified renovators must either assume lead -based paint is present and apply lead safe work practices, or use an EPA approved test kit with the knowledge that the results are likely to be inaccurate. Ultimately, renovators and their customers are left assuming the burden of additional costs and requirements associated with the rule – all without the reassurance that these burdens address a lead-based paint hazard.

Specifically, as has been raised previously by NAHB, the lack of an EPA approved lead-based paint test kit capable of meeting both response criteria was recognized by EPA under both economic analyses prepared for the RRP rule, f irst in 2008 when the original regulations for the program were being finalized, and again in 2010 when EPA decided to significantly expand the number of target housing units subject to the rule by removing the "opt out" provision. In both cases, the agen cy recognized that a test kit satisfying both the positive and negative test criterion would not be available in the first year the rule was effective. However, EPA assumed that by year two of the program an accurate EPA approved LBP test kit would be available and on the market.

EPA had estimated that the number of RRP renovation events subject to this rule would be reduced by almost half, from 8.4 million in the first year to 4.4 million in the second year, solely because of the availability of a qualifi ed LBP test kit. [8] EPA also projected a significant decrease in the cost of the RRP program from $758 million in the first year to $407 million in the second year. [9] Similar, though not

[4] 80 *Federal Register* 79335 (December 21, 2015)
[5] Explanatory Statement, Consolidated and Further Continuing Appropriations Act, 2015
[6] 80 *Federal Register* 79335 (December 21, 2015)
[7] 80 *Federal Register* 27623 (May 14, 2015)
[8] U.S. Environmental Protection Agency, (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*
[9] Id.

identical, language was included in both economic analyses explaining EPA's assumptions:

> Because not all buildings built before 1978 have lead -based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule. Currently available test ki ts for detecting whether lead -based paint is present have a high false positive rate resulting in the frequent use of lead safe work practices when they are not necessary, i.e., when lead-based paint is not present. EPA is working on the development of tes t 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.[10]

EPA should move expeditiously to revisit the original regulation and reevaluate the economic analysis of the program as it was prem ised on bringing a qualified, recognized test kit to market in year two of the program. Today, almost six years later the program still struggles to come to terms with the lack of a fundamental tool promised to the regulated community to help implement the regulation despite commitments from the agency that it would take steps to address the issue in 2010 if improved test kits were not available.[11]

RESPONSE TO SPECIFIC LEAD TEST KIT AND FIELD TESTING OPTIONS PROVIDED BY STAKEHOLDERS

EPA is providing stakeho lders the opportunity during the current comment period to respond to recommendations the agency received from stakeholders. NAHB urges EPA to acknowledge that existing alternatives cannot substitute for nor serve the original intended purpose of the lead test-kit. The potential lead test kit and field testing options raised by stakeholders during the earlier public comment period are not sufficient to address the regulatory deficiencies present in the RRP program resulting from the failure to bring a comme rcially available, reliable, affordable lead -test kit upon which the existing requirements of the RRP rule were predicated on. NAHB looks forward to the anticipated Section 610 review scheduled to begin later this year and the opportunity it presents for EPA to truly tackle the issues at hand via retrospective review of the RRP rule as a whole.

Eliminate or modify the positive response criterion.

NAHB is highly concerned that any effort to modify the test kit criterion will only mask the existing problem and in fact create an entirely new issue of uncertainty for existing EPA approved lead-based paint test kits

[10] U.S. Environmental Protection Agency, (2010). *Economic Analysis for the LRRP Opt-Out and Recordkeeping Final Rule.*

[11] As outlined in the preamble to the final RRP regulation "After 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. Therefore, this regulation will take effect at the same time for target housing and child occupied facilities regardless of whether they were built before or after 1960. Nonetheless, if the improved test kits ar e 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." at 73 *Federal Register* 21712-21713 (April 22, 2008).

in the process. The current problem is that no commercially available lead-based paint test kit has been brought to market that has been able to pass both the positive and negative response criterion established by EPA. As previously reported by EPA this is due to the exceedance of false positives tied to issues with existing test kits sensitivity to the presence of lead in paint at levels well below the regulated level.

To modify or eliminate the positive response criterion would ease EPA's ability to certify an existing lead-based paint test kit for market. However, certified renovators w ould not be any more certain that they are being provided a field test kit that serves the purpose which it was intended. Certifying existing lead-based paint test kits that are sensitive to lead well below regulated levels would mean any positive field test could be indicating practices are needed at a site where they are not otherwise required.

Test kits would remain an unreliable means of determining the presence of lead for the purposes of the RRP program as lead safe work practices are only required where the presence of lead in paint has been established at the regulated level of lead, set at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight, which was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[12]

The establishment of the regulated level of lead at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight was done through statute when Congress adopted the Residential Lead -based Paint Hazard Reduction Act of 1992. [13] Provisions were made to provide the Secretary of Housing and Urban Development (HUD) and the EPA Administrator with the regulatory authority to modify the regulated level of lead following a subsequent federal rulemaking process H owever, only HUD can modify the regulated lead level as it applies to target housing units. [14] As such, it is beyond the scope of EPA's current efforts to consider a change in the definition of lead -based paint for the purposes of the RRP program outright. Elimination or modification of the positive response criterion would result in a de facto change that similar exceeds the agency's authority.

Furthermore, certification of test kits that require lead safe work practices be applied in situations where lead-based paint is present at lower than regulated levels would blur the line between the concepts of renovation, covered under RRP, and abatement, covered under separate EPA regulations. Under 40 CFR § 745.83 the term renovation is defined for the purposes of establishing the scope of covered activities under the RRP program. The regulation states that "[r]enovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223)." Through the establishment of this distinction, EPA clearly differentiated renovation activities from abatement activities speaking to the difference in intent, practice, and outcome associated with the two different types of activities.

EPA itself, in the preamble to the 2008 regulation, stated that "EPA is not interested in teaching persons how to be painters, plumbers, or carpenters. Rather, EPA's objective is to ensure that pe rsons who already know how to perform renovations perform their typical work in a lead-safe manner."[15] As such, requiring

[12] P.L. 102-550

[13] Id.

[14] As defined in section 302(c) of the Lead-Based Paint Poisoning Prevention Act.

[15] 73 *Federal Register* 21701 (April 22, 2008)

RRP compliance when lead -based paint is present at lower than federally regulated levels would go beyond the scope of the current Congressional directive, would alter the foundation of the program, and exceed the statutory authority provided to the agency under 402(c)(3) of the Toxic Substances Control Act (TSCA).

Modifications to XRF Training Requirements

Prior to responding to the specific proposal on X-Ray Fluorescence (XRF) testing, NAHB must remind the agency that XRF testing existed as a lead-based paint testing methodology at the time the rule was first being developed by EPA. EPA evaluated and dismissed XRF testing as both infeasible and too expensive during the development of the original regulation for compliance with the rule. Instead, as discussed above, the original regulations finalized in 2008 and the amendments to the program adopted in 2010 relied upon the development of new technology (the lead test kit) for field testing by certified renovators to comply with the regulation.

Furthermore, NAHB maintains that even should EPA modify existing requirements for operation of the XRF this testing methodology is not a one for one replacement for lead test kits. The proposal to "provide reduced Lead Renovation, Repair and Painting Program training requirements for X -Ray Fluorescence technicians" is vague and does not clearly illustrate what changes to current requirements would occur. Assuming the proposal intends to attempt to reduce the burden on certified renovators by eliminating the need to complete additional EPA training course as currently required there remain additional procurement, operation and maintenance costs for certified renovators. In addition, EPA would not be able to eliminate the ability for states to establish, as some already do, additional training requirements or inspection limitations including in states operating under the EPA run RRP program.

Initial capital costs of purchasing the unit coupled with the lifecycle maintenance costs for disposal of radioactive material will be substantial. Additionally, the time and costs associated with manufacturer training requirements will still be an additional burden above and beyond the RRP training required by EPA. Even if an individual certified renovator or certified firm chose to pursue this option these costs would likely limit the purchase to one per firm limiting their ability to simultaneously test at multiple sites. With a viable test kit such limitations would not be an issue for lead test kits as conceptualized in the development of the RRP program. Lead test kits were intended to be a field test that would be affordable and accessible for renovators at each job site without such limitations.

- Liability – for ownership, maintenance, calibration, readings, disposal. Expands concerns renovators already have with increased liability associated with taken on work in pre -1978 buildings. NAHB members have indicated that this can be a deciding factor in turning away work in certain areas.
- Additional issues regarding third party testing restrictions on the books in certain states which will not be affected

To internalize the function of XRF technician, certified renovators would be taking on a role that is outside its traditional scope of their profession thereby exceeding the intent of EPA's expectation for the program where they stated they wanted to help RRP professionals accomplish perform their typical work in a lead safe manner. Taken cumulatively, the remaining hurdles towards adoption by certified renovators of XRF

testing reinforce the fact that XRF is not a one for one replacement for lead test kits. If EPA's intent is to provide certified renovators with an alternative option that meets the original intent of the test kit than XRF testing does not accomplish this goal.

CONCLUSION

NAHB urges EPA to avoid creating further unintended consequence for the regulated community by attempting to forcibly equate alternative test kit and field testing options that cannot substitute for nor serve the original intended purpose of an affordable, accurate, commercially available EPA approved lead test kit under the existing RRP rule. Since EPA's own analysis and rationale for the existing RRP rule was premised on the existence of such a lead-based paint test kit having already been brought to the market. In light of this glaring deficiency under the existing RRP rule NAHB urges EPA to shift its focus to a more comprehensive examination of the existing scope of the RRP rule accounting for the absence of an affordable, accurate, and commercially available lead-based paint test kit as originally envisioned by the agency and ensure that the RRP rule's requirements do not continue to be misapplied on such a widespread basis.

Thank you for your consideration. NAHB staff and its members stand ready to work with EPA during the entirety of this stakeholder outreach process and welcome any opportunity to participate in individual follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve the program, reduce unnecessary regulatory burdens and eliminate unintended consequences without undermining the effectiveness and integrity of the program or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 2668327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,

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July 6, 2015

James Jones, Assistant Administrator
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(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting; Notice of Public Meeting (EPA–HQ–OPPT–2005–0049)

Dear Assistant Administrator Jones,

On May 14, 2015, U.S. Environmental Protection Agency (EPA) published a notice of public meeting in the *Federal Register* announcing a "Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting." [1] Acting in response to a Congressional directive EPA is seeking information related to:

1) The existing market for lead test kits as referenced in the 2008 Lead; Renovation, Repair and Painting Program rule;

2) The development or modification of lead test kit(s) that may meet the EPA's positive -response criterion (in addition to the negative -response criterion); and

3) Other alternatives for lead-based paint field testing.

The National Association of Home Builders (NAHB) appreciates the opportunity to provide comments on this important issue. The comments included in this letter are intended to supplement and expand upon those comment s made by NAHB member and former NAHB Remodelers Chair Bob Hanbury at the June 4, 2015 public meeting.

NAHB is a Washington, D.C. -based trade asso ciation representing over 140,000 builder and associate member firms that are organized inmore than 700 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. The organization's membership includes those wh o design, construct, and supply single - family homes; build and manage multi -family, light commercial, and industrial structures; develop land; and remodel existing homes.

Over 80 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA), 55,000 NAHB members indicate they are involved in remodeling, and NAHB members collectively employ over 3.4

[1] 80 *Federal Register* 27621-27623 (May 14, 2015)

million people nationwide. Collectively, NAHB's members will construct about 80% of the new housing units projected for 2015.

Overview

On April 22, 2008, EPA published the final rule for the Lead-Based Paint Renovation, Repair and Painting (RRP) program. This regulations established requirements, effective April 22, 2010, that contractors use lead -safe work practices during renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978 unless a determination can be made that no lead-based paint would be disturbed during the renovation or repair. Among other provisions outlined in the 2008 rule, it was established by EPA that an EPA-recognized lead test kit, when used by a certified renovator, could be used to reliably determine whether federally regulated levels of lead-based paint is present. If regulated levels of lead-based paint[2] is not present there is no requirement to employ lead -safe work practices under the RRP rule. The rule was amended in 2010 by EPA when, among other provisions, the opportunity to opt-out was removed from the program. The opt-out allowed homeowners to affirmatively opt-out of the requirements of the RRP program when no children under six or pregnant women were present in the target housing under renovation . Elimination of the opt -out provision affected 39,886,000 units, according to the economic analysis prepared by EPA and resulted in the RRP rule covering millions of additional pre-1978 homes that were not previously subject to the rule. The 2010 amendments made no change to the use of the lead test kit or the assumptions EPA made regarding the ability to bring to market a commercially available, reliable, affordable lead -test kit that met all of the regulatory required criteria.

At the time the 2008 rule was finalized no available test kit met the criteri a established by EPA under the regulation. Under 40 CFR 745.88(c) for a lead test kit to be recognized by EPA it must meet separate negative -response and positive -response criteria which essentially relate to the probability of receiving false negative results and false positive results when using the test kit.

- 40 CFR 745.88(c)(1). The negative-response criterion states that for paint containing lead at or above the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a negative response less than or equal to 5% of the time must be met.

- 40 CFR 745.88(c)(1)-(2). The positive-response criterion states that for paint containing lead below the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a positive response less than or equal to 10% of the time must be met.

To date, there are only two lead test kits recognized by EPA and available nationwide and both have only met the negative-response criterion. EPA stated that this recognition will remain in effect until EPA announces recognition of the first test kit that meets both criteria established in the rule.[3] Under the regulation, all lead test kits recognized after September 1, 2010 must meet both the negative-response and positive-response criteria.

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[2] The standard is set at content levels that equal or exceed a level of 1.0 milligram per square centimeter (mg/cm2) or 0.5 percent by weight.

[3] http://www2.epa.gov/lead/lead-test-kits (accessed July 1, 2015)

The lack of a test kit meeting both response criteria was reflected in the required economic analysis which was prepared when the original regulations for the program were being finalized in 2008 and again when the program was amended in 2010. In both cases, the agency recognized that a test kit satisfying both criteria would not be available in the first year the rule was effective. However, EPA assumed that in year two of the program a qualified, recognized test kit would be available and on the market. Indeed, EPA estimated that the number of RRP renovation events would be reduced by almost half, from 8.4 million in the first year to 4.4 million in the second year, solely because of the availability of a qualified test kit.[4] EPA also projected a significant decrease in the cost of the RRP program from $758 million in the first year to $407 million in the second year.[5] Similar, though not identical, language was included in both analyses explaining EPA's assumptions:

> Because not all buildings built before 1978 have lead-based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule. Currently available test kits for detecting whether lead-based paint is present have a high false positive rate resulting in the frequent use of lead safe work practices when they are not necessary, i.e., when lead-based paint is not present. 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.[6]

NAHB has been actively engaged in EPA's lead -based paint program for the residential sector since its inception and has maintained a commitment over time to program implementation including consistently advocating on behalf of the remodeling industry on th e importance of obtaining and maintaining the required training and certification under EPA's RRP rule. In line with that commitment, NAHB has repeatedly raised concerns over the practical implications for the program resulting from the fact that a reliabl e pre-renovation test kit that can be used to determine if regulated levels of lead are present, as defined, on painted surfaces in pre -1978 structures has never been brought to market. In fact, EPA itself eloquently summarized the need for test kits in the announcement for the June 4th public meeting stating "lead test kits recognized by EPA should also serve as a quick, inexpensive, reliable, and easy to perform option for lead -based paint testing in the field."[7]

In June 2013, NAHB met with EPA to discussongoing work related to recognition of lead test kits. In a July 31, 2013 response letter to NAHB , EPA clearly stated that the agency would make no additional commitment of resources to foster the development of a test kit that would meet both the false negative and false positive criteria outlined in the RRP rule; nor would EPA provide any additional support for test kit research and d evelopment efforts by private companies. NAHB understands the fiscal constraints EPA has faced and the technical limitations that have limited

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[4] U.S. Environmental Protection Agency, (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*
[5] *Id.*
[6] U.S. Environmental Protection Agency, (2010). *Economic Analysis for the LRRP Opt-Out and Recordkeeping Final Rule.*
[7] 80 *Federal Register* 27623 (May 14, 2015)

advancements in developing a viable test kit. However, the decision by EPA to relinquish responsibility for a key component of the program on which the EPA economic analysis and subsequent program design choices were founded remains troubling.

As a result of EPA's decision, the RRP rule is increasingly applied to buildings that may otherwise have been excluded from the scope of the rule by a test kit that can accurately reflect the presence of regulated levels of lead-based paint. Without a reliable test kit, certified renovators must either assume lead-based paint is present and apply lead safe work practices, or use an EPA approved test kit with the knowledge that the results are likely to be inaccurate. Ultimately, renovators and their customers are left assuming the burden of additional costs and requirements associated with the rule – all without the reassurance that these burdens address a lead-based paint hazard.

Ensuring a structurally sound regulatory program that accurately reflects the on the ground realties faced by the remodeling industry will ultimately result in a more robust program overall. As it is currently being implemented the program is an inefficient tool for achieving the environmental and health goals of the underlying statute and regulation. The use of time, resources, and capitol on RRP renovation jobs that could otherwise have been deemed outside the rule's scope of coverage undermines the programs ability to target resources where they are most needed. The increased costs of these renovation jobs can also contribute to homeowners increasing their risk by putting off needed renovations, taking them on themselves or turning to uncertified contractors acting in violation of the rule.

As the representative from the U.S. Department of Housing and Urban Development raised during his statement at the public meeting, the lack of a test kit satisfying the RRP's requirements undermines the government's ability to meet both its responsibility to protect the health of the public and be good fiduciary stewards of the money it is entrusted to oversee. While he spoke in his role as a public servant, the same can be said for the relationship between renovators and their clients and paints a clear picture as to why the lack of a commercially available, reliable, affordable lead-test kit is such a concern for the remodeling industry.

Economic Analysis

The lead test kit status quo has concerned NAHB for many years as the economic analysis of the RRP rule conducted in 2008 for the final rule and for the 2010 amendments was predicated on the fact that a reliable, affordable field test kit would be available on the market in year two of the program. While some stakeholders will argue that the cost effectiveness of the testing option is not EPA's concern, under both the statute, existing Executive Orders, and related guidance documents EPA is required to be concerned with the cost effectiveness of the rule. First, as EPA has clearly acknowledged in the regulatory preamble to the 2008 final rule, the agency "as directed by TSCA section 2(c), considered the environmental, economic, and social impact of this rule."[8] In addition, the regulations for the RRP program have consistently been subject to interagency review under Executive Order(E.O.) 12866. Under E.O. 12866, "Regulatory Planning and Review,"[9] each agency is to identify and assess available alternatives to direct regulation and alternative forms of regulation to reduce costs and burdens.Agencies must also assess the costs and benefits of proposed regulations and only adopt those whose benefits justify their costs. Importantly, E.O. 12866 also requires agencies to base regulatory decisions "on the best

[8] 73 *Federal Register* 21701 (April 22, 2008)
[9] 58 Fed. Reg. 51,735 (Sept. 30, 1993).

reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation."[10]

Furthermore, EPA was so confident that an improved test kit would be in use by the second year of the program th at in the preamble to the final rule in 2008 the Agency committed that "if the improved test kits are not commercially available by September 2010, EPA will initiate rulemaking to extend the effective date of this final rule for 1 year with respect to owner -occupied target housing built after 1960."[11] Quite obviously that time has come and gone and EPA has failed to hold up its commitments t o the regulated community. However, five years later the opportunity exists, through stakeholder engagement such as this, to examine what the real world implications of this failure have been and to look toward practical fixes to reform the program movingforward.

Existing Alternatives Can't Substitute For Lead Test-Kit

NAHB acknowledges that two additional testing methods currently exist but would remind EPA that both methods also existed at the time the rule was first being developed. The two testing options are hand held XRF testing and the submitting of paint chip samples for subsequent chemical analysis by an EPA accredited laboratory under the National Lead Laboratory Accreditation Program (NLLAP). NAHB continues to believe that neither of these two e xisting lead-based paint testing methods serves as substitutes for the reliable, affordable lead -based paint test kit that this rule was predicated on. Furthermore, EPA evaluated and dismissed both of these existing lead-based paint testing methods as both infeasible and too expen sive during the development of the original RRP rule for compliance with the rule. While both have subsequently been approved for use in the absence of a reliable test kit the practical issues renovators face when contemplating the use of either an XRF or paint chip analysis to test for the presence of lead-based paint illustrate why they cannot serve as a direct substitute for the test kit.

Paint chip analysis is not a field test. Once collected the samples must be sent off to a certified laboratory for an alysis costing the consumer money in the form of project delay and preventing the certified renovator from legally beginning work . Meanwhile, while XRF analysis can at least provide immediate results in the field there remain several practical, economic, and even regulatory barriers that will prevent XRF testing from ever serving as an equivalent tool to the quick, affordable, and reliable lead t est-kit envisioned by EPA under the final RRP rule. For example, in looking specifically at XRF testing the addition al costs , whether absorbed by a company directly or through contracting with an outside firm , can include meeting requirements for additional certification and training to operate the XRF testing device, capital investment in the XRF equipment, and the obvious delays resulting from a certified renovator having significantly more potential job sites requiring lead-based paint testing than available XRF devices and certified staff to operate the testing device. All of these factors contribute to the result that neither XRF nor paint chip analysis can serve as a functional equivalent of the lead test-kit as envisioned by the original rule. Finally, it would be contrary to the agency's original intent under the rule to require certified renovators to rely upon lead testing methods which they cannot perform themselves without subsequent training and certifications from both EPA and the states.

A Practitioner's Quagmire

For some renovators restrictions on the use of the test kits already exist at both the state and federal level due in part to the questionable reliability of the test kits. For others, operating in states such as Illinois, it is illegal for the RRP certified renovator to be the one testing for the

[10] *Id.* § 1(b)(7).
[11] 73 *Federal Register* 21713 (April 22, 2008)

presence of lead and they must bring in a state certified third party to do any testing. Couple all this with the broader regulatory and market constraints associated with other testing options (e.g. XRF) and most certified renovators are left with limited choices in the field.

Furthermore, homeowners subject to 1018 disclosure requirements must also grapple with the uncertainty of test kits. Despite the questionable reliability of the lead test kits homeowners must disclose any known results when they go to sell their property . While EPA and HUD have also encouraged homeowners to disclose information about the reliability of the tests the prospects of a false positive reading elevates concern for homeowners. As a result, the decision to act under the presumptive presence of lead may also be driven by the clients themselves faced with the lack of a test kit that meets both the positive and negative criteria of the regulation.

The resulting quagmire practitioners' face is that without a reliable, affordable field test kit or a cost competitive realistic alternative the most "reasonable" choice available has been to act under the presumptive presence of lead. I n other words, for any home or child occupied facility built before 1978 the renovator chooses to apply the requirements of the RRP rule despite the possibility that no lead-based paint is present. As a result, certified renovators are over applying the rule increasing the number of RRP events beyond any reasonable estimates for the program and creating an unnecessary burden on their businesses and their clients. According to EPA, as illustrated in Figure 1, 24 percent of homes built between 1960 and 1977 c ontain lead-based paint. As a result, when renovators act under the presumptive presence of lead in dealing with this segment of housing stock that means that 76 percent of the time the rule is likely being applied in a home never intended to be covered by the RRP rule. Applying this rule in such a manner doesn't serve to provide the desired health benefits or mitigate a hazard to pregnant women or children under 6 and goes well beyond the scope and intent of the statute and the regulation. In fact the opt-out was originally included by EPA in the 2008 rule to help address this concern of over application of the rule.

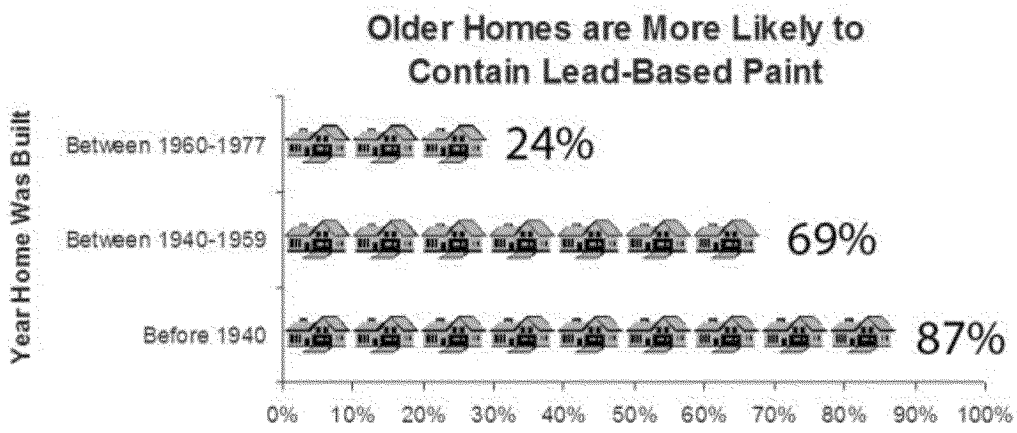

Figure 1[12]

In addition, acting under the presumption of presence not only results in an over -application of the rule increasing regulatory costs and reducing the efficiency and efficacy of the rule but it also opens up the regulated community to unnecessary liability concerns. Once a certified renovator presumes the presence of lead, then all requirements of the rule go in effect. Should EPA initiate an inspection, that inspector will likewise presume the presence of lead. Thus, despite the fact

[12] http://www2.epa.gov/lead/protect-your-family#sl-home (accessed on May 5, 2015)

that TSCA enforcement of the RRP rule is limited to actual creation of lead-based paint hazards[13], renovators may endure lengthy and invasive federal investigations and be forced to pay thousands in fines even though a lead-based paint hazard never existed.

The renovator will be subject to record keeping and work practice requirements equivalent to a work site where lead paint is known to be present and if an enforcement action is taken there will be no difference between the two sites. The potentially burdensome enforcement weight the regulated community finds itself voluntarily assuming because of a flawed regulatory structure runs counter to the intent of the test kit provisions and the design of the program as assumed in both the 2008 and 2010 economic analyses.

June 4, 2015 Stakeholder Meeting

NAHB is encouraged by the initiation of the stakeholder dialogue called for by Congress in the report language accompanying the FY 2015 Consolidated and Further Continuing Appropriations Act:

> The Agency is directed to prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule. If no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives.[14]

In addition, NAHB appreciates the ongoing nature of this dialogue and the opportunity to offer additional thoughts on issues raised at the June 4th meeting. While all federal lead based paint programs are ultimately moving to the same end – mitigating the hazards presented by exposure to lead based paint – they are by design very different programs. These programs are carried out by different agencies, under varying regulatory constraints and targeting different segments of the regulated community.

Regulated Level of Lead

The establishment of the regulated level of lead at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[15] Provisions were made to provide the Secretary of Housing and Urban Development (HUD) and the EPA Administrator with the ability to modify that level through regulation. However, only HUD can modify the regulated lead level as it applies to target housing units. As such, it is beyond the scope of EPA's current efforts to consider a change in the definition of lead-based paint for the purposes of the RRP program.

Despite this regulatory authority, HUD has taken a different approach and focused on funding research into test kits that would meet both the false positive and false negative criteria using the established regulated level of lead. Testimony was provided during the public meeting on June 4, 2015 from a HUD-funded company working to adapt existing test kits to address the issues that arise due to their sensitivity to the presence of lead in paint at levels well below the regulated level. NAHB commends HUD for its continued commitment to research despite the 2013 decision by EPA to end its research on lead test kits.

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[13] 15 U.S. Code § 2682(c)(3)
[14] Joint Explanatory Statement in the Congressional Record for P.L. No: 113-235
[15] P.L. 102-550

Renovation is not Abatement

Furthermore, at the June 4th meeting the discussion of the regulated level of lead was extended to also include the concept that EPA should examine whether RRP requirements be applied in situations where lead-based paint is present at lower than regulated levels. To do so would blur the line between the concepts of renovation, covered under RRP, and abatement, covered under separate EPA regulations. Under 40 CFR § 745.83 the term renovation is defined for the purposes of establishing the scope of covered activities under the RRP program. The regulation states that "[r]enovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223)." Through the establishment of this distinction, EPA clearly differentiated renovation activities from abatement activities speaking to the difference in intent, practice, and outcome associated with the two different types of activities. This distinction is critical given the presumption by some stakeholders that an examination of the test kit issue can and should result in a reexamination of the very foundation of this program.

EPA itself, in the preamble to the 2008 regulation, stated that "EPA is not interested in teaching persons how to be painters, plumbers, or carpenters. Rather, EPA's objective is to ensure that persons who already know how to perform renovations perform their typical work in a lead-safe manner."[16] As such, requiring RRP compliance when lead-based paint is present at lower than regulated levels would go beyond the scope of the current Congressional directive, would alter the foundation of the program, and exceed the statutory authority provided to the agency under 402(c)(3) of the Toxic Substances Control Act (TSCA).

While these are only two examples of items raised during the meeting NAHB would urge EPA to be extremely cautious in expanding the scope of the current undertaking. NAHB's recommendations have been narrowly tied to the absence of the test kit, a component of the regulation, and the potential remedies that may be a means of achieving the goals it was originally aimed at providing. While the inclusion of a yet to be developed technology in regulation can drive technological innovation that clearly has not occurred to date with regards to the RRP lead test kits. EPA should not sit back and ignore the reality of program implementation and the unintended consequences of what happens when practitioners must act absent that necessary technological innovation.

Next Steps

While NAHB applauds HUD for continuing research on test kits, and is pleased to see EPA seek stakeholder input, it is clear that a test kit meeting the Rule's requirements will not be available for the foreseeable future. In order to provide all parties with an adequate understanding of the RRP Rule's true costs and benefits, NAHB urges EPA to revisit and revise the economic analysis developed for the program. The Agency's original economic analysis for the RRP rule was predicated on a faulty assumption that presumed a commercially available, reliable, and affordable lead-based test kit that met the regulatory criteria would be available in year two of the program. In fact EPA estimated that once reliable test kits were available in the second year of the rule's implementation, the number of work sites covered by the rule would be cut in half.[17]

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[16] 73 *Federal Register* 21701 (April 22, 2008)

[17] U.S. Environmental Protection Agency. (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*

In reality, the lack of reliable test kits which meet both the positive and negative criteria as outlined in the 2008 RRP regulation calls into question EPA's original economic analysis upon which the requirements for the rule were based. Furthermore, the fact that the economic analysis for both the original 2008 regulation and the 2010 amendment were both predicated on this assumption undermines the validity of the data presented to the Office of Management and Budget during review of the rules under E.O. 12866. As such, it calls into question whether the program as it currently exists would have been adopted if the economic analysis would have been based on existing technology and not the development of an elusive test kit yet to be developed.

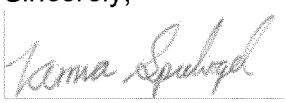
NAHB urges EPA to initiate as expeditiously as possible a review and revision of the economic analysis. A new economic analysis of the Residential RRP regulation should be conducted separate from actions EPA is undertaking in relation to other rulemaking proceedings and should take into account the underlying environmental, health and economic impacts of the RRP program. NAHB urges EPA to consider the adoption of measures that limit the scope of coverage and ensure that the estimated number of RRP events is more reflective of the goals and intents of the program. For example, EPA could limit the scope of housing stock covered by the regulation to homes built before 1960 which have a greater likelihood of containing lead-based paint. Furthermore, EPA could revisit the issue of an opt-out or other regulatory alternatives to ensure that the rule is effectively targeting the at risk populationidentified in the regulatory hazard finding avoiding application of the RRP program where lead-based paint hazards are not present.

The program as it is currently being implemented cannot efficiently target the underlying environmental and health goals it was established to meet. To address this deficiency EPA should act to narrow the targeted scope of the rule to cover those homes most likely to contain lead-based paint and those most likely to present an exposure risk to children under 6 or pregnant women. By effectively retargeting this program through an accurate economic analysis and a realistic evaluation of available tools and resources EPA will ensure that the RRP program moving forward works better for not only the certified renovators operating within the program but also for the clients and communities they serve.

Thank you for your consideration. NAHB staff and its members stand ready to work with EPA during the entirety of this stakeholder outreach process and welcome any opportunity to participate in individual follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve the program, reduce unnecessary regulatory burdens and eliminate unintended consequences without undermining the effectiveness and integrity of the program or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 266-8327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,



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July 5, 2016

Gina McCarthy, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460

(Submitted electronically)

RE: Petition for Reconsideration on EPA's Final Rule: Lead-Based Paint Programs; Amendment to Jurisdiction-Specific Certification and Accreditation Requirements and Renovator Refresher Training Requirements

Dear Administrator McCarthy,

On February 17, 2016, the U.S. Environmental Protection Agency (EPA) promulgated "Lead-Based Paint Programs; Amendment to Jurisdiction-Specific Certification and Accreditation Requirements and Renovator Refresher Training Requirements" ("Recertification Rule"), 81 Fed. Reg. 7987 (Feb. 17, 2016). Despite proposing a straightforward approach to streamline the recertification requirements of the Lead; Renovation, Repair, and Painting program, EPA chose a far more complicated approach for which the agency neither solicited nor received public input. The agency's adoption of an entirely new system for recertifying certified renovators creates additional burdens, is contrary to the agency's goals, and fails to satisfy the Administrative Procedure Act (APA).

Pursuant to APA section 553(e) and the Toxic Substances Control Act (TSCA) section 21, NAHB respectfully petitions EPA to reconsider its adoption of the Recertification Rule, and to initiate a rulemaking to repeal those provisions for which the public was not provided adequate notice. The rule EPA finalized bears little resemblance to the rule it proposed, in both purpose and substance. The Recertification Rule contradicts the agency's stated purpose for revising the RRP Rule in the first place. As finalized the amended rule does not encourage remodelers to remain RRP certified, nor does it decrease their participation burden.

NAHB is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily residential construction, remodeling, multifamily ownership and management, building material trades, building products manufacturing and supply, and commercial and light industrial construction projects. Over 95 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration, and NAHB members collectively employ over 3.4 million people nationwide. Four out of every five new homes are built by NAHB members.

NAHB members are involved in the development, construction and remodeling of for-sale single family homes across the spectrum, including first-time and low- and moderate-income homebuyers. They also construct, own and manage multifamily rental housing, including affordable rental housing. Because of the nature of their businesses, NAHB's members and their activities are also subjected to numerous laws, regulations and policies issued and enforced at the federal, state and local levels.

I. Background

The Recertification Rule amends a regulation EPA first promulgated in 2008 – the Lead; Renovation, Repair, and Painting program rule ("RRP Rule"), which regulates the disturbance of lead-based paint during renovation activities. In this latest revision, EPA proposed removing the hands-on requirement for the Certified Renovator refresher training course. 80 Fed. Reg. 1873 (Jan. 14, 2015).

Contrary to the stated goals and observations enumerated in the proposed rule, however, the agency put forth a final rule that further complicated an already confusing schedule of requirements for certified renovators. To do so, EPA made two significant changes. First, EPA shortened the recertification period for certified renovators who take a course that does not have a hands-on component from five years to three years. Following this three-year period, the certified renovator who elects this option must take a recertification course with a hands-on component. Second, EPA established a separate path for renovators who elect to take a course with a hands-on component by providing them a recertification period of five years (instead of the three years for those taking a course that has no hand-on component).

Thus, EPA altered the recertification program by setting up two separate recertification schedules – three years/five years or every five years – based solely on the format of one element of the refresher course. Not only do these changes undermine the agency's intent to simplify the recertification process and reduce the burden on remodelers to become recertified, they were never proposed during the rulemaking process. As a result, affected parties had no opportunity to provide input or suggest alternatives that may be more workable in the field. It is for these reasons that NAHB requests that EPA reconsider the Recertification Rule, remedy the substantive and procedural failings of the Rule and move to enact new regulations that support the initial intent of the agency's proposal.

II. The Recertification Rule Is Problematic and EPA Needs to Reconsider the Rule

a. The Recertification Rule is Unnecessarily Burdensome and Complicated

Throughout the proposal, EPA reiterated its reasons for eliminating the hand-on training component. The agency cited its belief that it is "less important for the refresher course to include hands-on training" because of the less technical nature of the tasks being performed. 80 Fed. Reg. at 1875. EPA also recognized the importance of reducing time and expense burdens for the many certified renovators that must travel significant distances to attend training programs. *Id.*). Despite these intentions, the agency has fallen short. Unlike the proposal, the final rule is confusing and cumbersome. More importantly, because of these faults, it provides a

disincentive for renovators to remain in the program, perhaps jeopardizing the availability of sufficient certified renovators to perform regulated activities in certain geographic areas.

In both the proposal and the final rule, EPA states that "the proposed revisions are intended to improve the day-to-day function of these programs by reducing burdens to industry and the EPA and by clarifying language for training providers, while retaining the benefits of the original rules." Instead, the agency is further complicating an already confusing process and adding burdens that are neither wise nor warranted. Under the existing RRP program, certified renovators are already on a rolling schedule as to when they need to get recertified. The final rule increases the uncertainty, as it adds two tracks for recertification that must now be monitored and documented if renovators are to maintain their certifications, and the tracks themselves are on different time schedules. A standard path would have been much easier to follow for both renovators and EPA.

Similarly, EPA was keenly aware of the burdens associated with including a hands-on requirement as part of refresher training, particularly for renovators who live far from a training facility. To address these concerns, EPA not only proposed to eliminate the requirement, but also asked for comment on other ways to minimize the burdens associated with the hands-on training. Importantly, the agency also recognized the link between travel and cost burden associated with limited access to training in certain areas and realized that eliminating the hands-on training requirement for refresher courses would encourage more renovators to get recertified. EPA plainly stated that having more certified renovators would result in "a workforce better able to perform renovations in a lead-safe manner." 80 Fed. Reg. at 1875.

Indeed, EPA even concluded that the capabilities of certified contractors and the quality of their work would not be compromised by the proposal, stating that "Now that renovators will take the refresher course only after being initially certified in a way that includes hands-on training, EPA believes it is less important for the refresher course to include hands-on training. In addition, renovators that are seeking recertification have been practicing the hands-on skills on renovation jobs during their 5-year certification." 80 Fed. Reg. at 1875 In addition, EPA stated that in light of the less technical nature of the work practices taught in the renovator courses (as compared to courses regarding lead abatement), receiving hands-on training once is sufficient.

NAHB agrees and has long been an advocate of removing the hands-on component from the refresher course. NAHB submitted comments in support of EPA's proposal on February 13, 2015 "applaud[ing] EPA on its efforts to advance a common sense proposal…" and focusing primarily on the timing of the final rule's issuance to ensure that all certified renovators would have the opportunity to find a refresher course that best suits their needs.

Unfortunately, in the interim, EPA finalized a rule that abandoned many of the intended improvements and reinstated the burdens it sought to avoid. The recertification process has been made more cumbersome and difficult, effectively undermining the expectation that more renovators will take the refresher course and get recertified. As a result, fewer certified renovators will likely be able to capitalize on the anticipated savings or efficiencies associated

with accessing on-line only training to maintain their certification. EPA is strongly urged to modify the rule.

b. The Recertification Rule Does not Satisfy the Requirements of the Administrative Procedure Act

The APA requires agencies to include three specific elements in a notice of proposed rulemaking (NPRM). 5 U.S.C. §553(b). The NPRM must include 1) the time, place, and nature of the proceedings; 2) the legal authority under which the rule is proposed; and 3) "the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* Agencies must also provide the public with "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. §553(c). Courts have interpreted these two provisions of the APA as requiring that a final rule constitute a "logical outgrowth" of the proposal. *See, e.g., CSX Transp., Inc. v. Surface Transp. Bd.,* 584 F.3d 1076, 1078 (D.C. Cir. 2009)(describing the agency's obligation under 5 U.S.C. §553(b)(3) to include in the notice the terms and substance of the proposal); *International Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) and *Environmental Integrity Project v. EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005)(providing the rationale for the APA's notice requirements found at 5 U.S.C. §553(c)).

Agencies must provide adequate information in the proposal so that the public can offer comments and have an opportunity to contribute to the administrative record. As the D.C. Circuit stated in *CSX*, a "final rule qualifies as a logical outgrowth 'if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. By contrast, a final rule fails the logical outgrowth test and thus violates the APA's notice requirement where 'interested parties would have had to 'divine [the agency's] unspoken thoughts,' because the final rule was surprisingly distant from the proposed rule.'" *CSX,* at 1079-80. (internal citations omitted)

EPA's actions in this rule fall into the latter category. Because EPA did not propose amendments to section 745.90, the renovator community had no notice that the agency might make revisions or finalize a rule changing the requirements to maintain certified renovator status, yet Section 745.90 is extensively revised in the final rule. In addition, the preamble gave no notice to the regulated community that the agency was contemplating a bifurcated recertification schedule for renovators based solely on the format of one element of the otherwise identical refresher training course.

Since EPA articulated a goal of encouraging renovators to get recertified in order to promote a "workforce better able to perform renovations in a lead-safe manner," and proposed steps to eliminate or at least minimize an "unnecessary" impediment to that goal and encourage recertification, the regulated community could not reasonably have anticipated that the agency would instead adopt an alternative that would create disincentives for renovators to forego hands-on training as part of a refresher course. In other words, given that the agency had actively sought to encourage recertification by offering ways to reduce the burdens associated with the hands-on component of refresher training, NAHB and its members did not contemplate that EPA would adopt a system that would offer benefits in a reduced form – through

mechanisms nowhere hinted at in the proposal – while sending the unmistakable signal that taking advantage of those benefits is disfavored by the Agency

Without notice of EPA's "unspoken thoughts," the regulated community was unable to meaningfully participate in the rulemaking process and to provide the agency with constructive feedback and data to support or dispute the agency's decision. For example, instead of submitting comments supporting EPA's proposal, NAHB would have written comments strongly opposing the agency's bifurcated approach. NAHB would have submitted comments highlighting the unneeded complexity EPA's actions have injected into the recertification process. NAHB would also have had an opportunity to notify its members – the individuals who must comply with these regulations – that a complex, bifurcated recertification process was headed their way. Without notice, and with an immediately-effective implementation date, NAHB has scrambled to try to assist its members in deciphering EPA's intent.

c. Because the Recertification Rule is not a Logical Outgrowth of the Proposal, it must be Repealed

EPA finalized a markedly different approach to the refresher training course than it had proposed, having provided NAHB and other stakeholders no notice of that divergent path. Courts have frequently found that vacatur is the appropriate remedy for an agency's failure to abide by the APA's notice requirements. *See, e.g., CSX* at 1082-83 (finding that where a failure to give adequate notice is "important and potentially prejudicial," vacatur is the appropriate remedy); *International Union, UMW* at 1261 (vacating and remanding a portion of the challenged regulation). NAHB has been similarly prejudiced by its inability to comment on EPA's revisions to section 745.90. Repeal of these portions of the Recertification Rule is appropriate in this case, and NAHB calls on EPA to quickly take this action.

Vacatur is appropriate, not simply to cure the procedural defect, but because the Recertification Rule does not accomplish the agency's stated goals for the revision. It complicates, rather than simplifies, the process for becoming recertified, and increases, rather than decreases the burden on certified renovators, who must now follow different timelines and processes based on the format of the refresher training course they attend.

NAHB calls on EPA to reconsider the Recertification Rule and remedy the substantive and procedural failings of the Rule detailed above. If you have any questions concerning this petition please contact Amy Chai (202-266-8232 or achai@nahb.org) or Tamra Spielvogel (202-266-8327 or tspielvogel@nahb.org).

Sincerely,

Susan Asmus
Senior Vice President

cc: Jim Jones, Assistant Administrator, Office of Chemical Safety and Pollution Prevention (OCSPP), U.S. Environmental Protection Agency
Tanya Mottley, Director, National Program Chemicals Division, OCSPP, U.S. Environmental Protection Agency
Michelle Price, Chief, Lead, Heavy Metals and Inorganics Branch, National Program Chemicals Division, OCSPP, U.S. Environmental Protection Agency
Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, White House
Darryl L. DePriest, Chief Counsel for the Office of Advocacy, U.S. Small Business Administration