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April 5, 2010

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

RE: Petition for an Interim Final Rule Delaying the Effective Date of the Lead: Renovation, Repair, and Painting Program Rule

Dear Administrator Jackson:

On behalf of the National Association of Home Builders (NAHB), I respectfully petition the U.S. Environmental Protection Agency (EPA) to use the Agency's authority under the Administrative Procedure Act (APA) to immediately issue an interim final rule to delay the April 22, 2010 effective date of the Lead: Renovation, Repair, and Painting Program (LRRP) Rule that was finalized on April 22, 2008.¹

When the LRRP Rule was issued, EPA had expected it would be able to meet its obligations within the timeframes set forth in the final rule. That has not been the case, however, and the basic infrastructure to successfully run and administer the program is lacking. Most importantly, the agency has failed to certify a sufficient number of trainers, renovators, or firms – a deficiency that will only ensure that this rule cannot be implemented nationwide by the effective date. Similarly, the agency lacks a reliable lead-based paint test kit. The current EPA-approved test kit yields false positive results between 42% to 78% of the time, further undermining the credibility of EPA's rule by requiring renovators to perform (and homeowners to pay for) lead-safe work practices where lead-based paint does not exist at levels regulated by the federal government.² Finally, the rule creates new and untenable liabilities that many renovators, through no fault their own, should not be required to bear.

¹ 73 Fed. Reg. 21692, 21758 (April 22, 2008); 40 CFR §745.81 (a)(1)(2)&(3).

² 71 Fed. Reg. 1588, 1599 (January 10, 2006).

NAHB fully supports the tenets of the LRRP Rule, and has worked collaboratively over the past several years with EPA and other interested stakeholders to ensure its smooth implementation for NAHB members, including residential remodeling firms, building material suppliers, and manufacturing industries. NAHB cannot, however, support the implementation of a rule where the governing agency is ill-equipped to fully administer the program and regulated entities have not been given the tools they need to comply.

In an effort to ensure that the implementation of the LRRP Rule is efficient and effective in reducing exposure to lead-based paint hazards, NAHB strongly believes that additional time is needed by both EPA and the regulated community to meet their respective obligations. NAHB hereby petitions EPA to use its authority under the APA's "good cause" provisions found in 5 U.S.C. §553(e) and 5 U.S.C. §553(d)(3) as justification to immediately issue an interim final rule to delay the effective date of the LRRP rule until EPA satisfies the following:

- Accredits a sufficient number of training providers and ensures sufficient distribution of those training providers nationwide (i.e., based in each state) to ensure equal and adequate access for regulated entities to be trained within a reasonable distance (e.g., no more than 150 miles);
- Demonstrates its ability to process the majority of firm and renovator certification applications within two weeks;
- Approves a reliable, consistent, and commercially available test kit that has an accuracy rating consistent with EPA's own stated objectives including:
 - False positive readings of not more than 10% when exposed to lead paint at or above the federal standard of 1.0mg/cm² or 0.05% by weight of less than 5%;
 - A cost of less than \$2.00; and
 - Reliable results in less than one hour.³

The APA Allows This Action and It Is Not Without Precedent

The APA sets out the general rulemaking obligations that apply to all federal agencies. In short, it allows interested parties to petition for the issuance, amendment, or repeal of a rule; requires notice of proposed rulemaking to be published in the Federal Register except in certain, limited circumstances; and allows agencies to bypass the 30-day publication requirement for good cause.⁴ Today's petition meets the APA

³ 40 C.F.R. §745.88(c).

⁴ See 5 U.S.C. §553.

requirements. First, NAHB clearly qualifies as an “interested person” in this undertaking.⁵ On behalf of its members, NAHB has participated in the agency’s efforts to regulate remodeling activities that disturb lead-based paint for more than a decade. Second, as explained below, there is sufficient “good cause” to compel the Agency to use its authority under APA Sections 553(b)(B) and 553(d)(3) to legally forego the notification and public procedure requirements and exempt the interim final rule from the 30-day prepublication requirement.

Indeed, such action is not without precedent – even within the realm of lead-based paint. In 2000, the U.S. Department of Housing and Urban Development (HUD) faced a similar problem of having an insufficient number of trained contractors to implement its lead-based paint rules in federally owned or assisted housing.⁶ HUD’s rule, like EPA’s LRRP Rule, was authorized by Congress under Title X and required contractors working in HUD-owned or assisted housing to attend a HUD-approved training course in lead-safe work practices before disturbing painted surfaces in “target housing.” Although the rule was scheduled to become effective on Sept. 15, 2000, HUD recognized the lack of trained contractors and licensed personnel to do the work required in certain areas, and published notice in the Federal Register on Sept. 11, 2000, delaying the rule by at least six months and up to one year in those areas where “the market for the services required under the regulation may not yet have reached the point where the requisite expertise is reasonably available for all programs and requirements of the regulation.”⁷ Today, EPA is faced with a similar situation and NAHB urges a similar response.

EPA is obligated to fully implement, oversee, and enforce the LRRP Rule on April 22, 2010. Because EPA is ill-prepared to fully execute its duties and the compliance date is fast approaching, there exists good cause to delay the effective date and announce this delay via an interim final rule. The APA anticipates circumstances where full public participation is impractical. Today’s petition and EPA’s positive response clearly fall within the parameters established by that statute.

⁵ The term “interested person,” while not defined in the APA, has been interpreted broadly. See, e.g., Attorney General’s Manual on the Administrative Procedure Act 39, *reprinted in* William F. Funk, Jeffrey S. Lubbers & Charles Pou, Jr., *Federal Administrative Sourcebook 75* (4th ed. 2008)(“The right to petition under [section 553e] must be accorded to any “interested person.” It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.”).

⁶ 64 Fed. Reg. 50140 (September 15, 1999).

⁷ 65 Fed. Reg. 54858 (September 11, 2000).

Good Cause Exists for Immediately Delaying the LRRP Rule

Section 553(b)(B) of the APA allows agencies to bypass temporarily notice and comment procedures where the agency has good cause, defined as those situations where “notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁸ APA’s legislative history further defines the term “impracticable” to mean a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings.⁹

The APA requires federal agencies to demonstrate their rationale for using the good-cause provision when promulgating an interim final rule by issuing a brief statement explaining to the public the reasons for the rule issued.¹⁰ NAHB believes any of the five reasons detailed below provide EPA with sufficient justification to invoke this provision. As such, EPA should immediately promulgate an interim final rule delaying the April 22, 2010 effective date of the LRRP Rule.

1. *Inadequate Network of EPA-Accredited Training Providers:*

The LRRP Rule requires EPA to accredit the training providers that are allowed to administer the certified renovator training courses. As of March 31, 2010, EPA has accredited 190 firms nationwide that are eligible to offer either the renovator or dust sampling technician courses as prescribed under the LRRP Rule. While NAHB is encouraged by the increasing number of EPA-accredited training providers after a slow start, we remain concerned that an insufficient training capacity continues to exist to ensure contractors are able to attend the required training before the effective date of the regulation.

Of particular concern are those contractors seeking to operate in Wyoming, Louisiana, West Virginia and South Dakota, where there are no EPA-accredited training providers, as well as those located in states that have only one or two approved training providers (e.g., Oklahoma, North Dakota, Montana, Utah, Arkansas, and New Mexico).¹¹ While many of the training providers are willing to provide services in neighboring states, travel can be cost prohibitive because EPA’s desired instructor-to-pupil ratio of 6:1 would require

⁸ 5 U.S.C. §553(b)(B).

⁹ See Legislative History of the APA, *supra* note 75, at 200.

¹⁰ 5 U.S.C. §553(b)(B).

¹¹ U.S. EPA, *Locate Accredited Renovation Training Programs* web page, available at http://cfpub.epa.gov/flpp/searchrrp_training.htm, accessed on March 31, 2010.

training firms to send multiple instructors to train sufficient numbers of contractors. The lack of a sufficient number of accredited trainers will impede the certification of renovators that are allowed to conduct and/or oversee the critical work practice provisions of the LRRP Rule. Without sufficient trainers and a certified workforce, the LRRP Rule cannot be implemented as intended, creating good cause for implementation delay.

- 2. *Insufficient Number of Certified Firms:*** The LRRP Rule prohibits any firm that has not been certified by EPA or an EPA-authorized state to offer, claim to offer, or perform renovations in any structure meeting EPA's definition of "target housing" (approximately 38 million units) or "child-occupied facilities" (approximately 100,000 units) after April 22, 2010.¹² Unfortunately, EPA only provided affected firms 6 months to comply and has taken minimal steps to advise contracting firms of their obligations under the LRRP Rule. EPA informed NAHB that as of Feb. 19, 2010, only about 2,500 firms had sought certification nationwide. Of those applications, EPA had completed its review and issued the required certification to only about half of those firms. EPA also disclosed that it takes the agency approximately 30 days to process contractor certification applications, despite EPA's goal to process the applications within two weeks.¹³

While NAHB fully expects the number of certified firms to have increased significantly since February, NAHB contends the number of firms that have been or will be certified by April 22 is nowhere near EPA's estimate of the 212,000 firms that will need certification.¹⁴ The number of firm certifications issued to date demonstrates that EPA currently lacks the resources and infrastructure to inform the regulated community, process applications in a timely manner, and enable firms to comply. As the number of applications grows, this challenge will be exacerbated. EPA's lack of forethought and planning, coupled with its shown

¹² 40 C.F.R. §745.81(a)(2).

¹³ Meeting of EPA, NAHB, and other industry and public health advocates, (February 25, 2010) (notes on file with author).

¹⁴ U.S. EPA, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities*, (March 2008), table ES-4. The number of firms estimated here is a reflection of the 2008 LRRP Final rule (73 Fed. Reg. 1588), EPA proposed an amendment to the rule in October 2009 (74 Fed. Reg. 55506, (October 28, 2009)), which estimates another 111,000 firms need to be trained if the amendment is finalized as proposed (U.S. EPA, *Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities*, (October 2009), table ES-5).

inability to promptly administer the core elements of the program are good cause for immediately delaying the effective date of the LRRP Rule.

- 3. *Insufficient Number of Certified Renovators:*** The LRRP Rule requires all renovations subject to EPA's rule to be directed and supervised by a "certified renovator" after April 22, 2010.¹⁵ A certified renovator is a person who has attended an 8-hour, EPA-approved training session led by an EPA-accredited trainer. EPA estimates that 235,916 individuals must be certified as renovators upon the effective date of the rule.¹⁶ According to EPA's web site, as of March 31, 2010, an estimated 75,000 contractors have attended an EPA-approved training course. EPA projects that the completion of the currently scheduled training courses will result in another 50,000 trained contractors by April 22, 2010.¹⁷ NAHB is encouraged by these numbers, yet despite the combined efforts of EPA, NAHB, and other stakeholders, the number of certified renovators remains well below what is required to achieve an acceptable level of compliance with the LRRP. The inability to achieve an adequate compliance rate by the effective date is good cause for issuing a direct final rule to delay the effective date of the LRRP Rule.¹⁸
- 4. *Lack of Accurate and Relevant EPA-Approved Test Kit:*** The LRRP Rule allows certified renovators to test the painted surfaces in the target homes prior to disturbing them to determine the presence of lead-based paint. If lead is not found, the contractor is not required to use lead-safe work practices. EPA has estimated that the number of renovation activities subject to the LRRP Rule will decrease from over 8.4 million renovation activities to 4.4 million renovation activities after a more reliable test kit is approved by EPA sometime in late 2010.¹⁹

¹⁵ 40 CFR §745.81(a)(3).

¹⁶ U.S. EPA, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities*, (October 2009), table 4-54.

¹⁷ U.S. EPA, *Lead Safe Training*, available at <http://www.epa.gov/lead/pubs/renovation.htm> accessed on March 31, 2010.

¹⁸ The number of renovators estimated here is a reflection of the 2008 LRRP Final rule (73 Fed. Reg. 1588), EPA proposed an amendment to the rule on October 2009 (74 Fed. Reg. 55506, (October 28, 2009)). The amendment estimates another 127,000 renovators need to be trained if the amendment is finalized as proposed. (U.S. EPA, *Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities*, (October 2009), table ES-5).

¹⁹ 73 Fed. Reg. 21750.

In the meantime, the only EPA-approved test kit available is neither accurate nor reliable. The only official study on the accuracy of these kits found that they had a false positive range of between 42% and 78%, meaning that vast majority of “positive” results did not, in fact, indicate lead-based paint at levels regulated by EPA.²⁰ In response, EPA has stated “*these false positive rates mean that the currently available test kits are not an effective means of identifying the 76% of homes built between 1960 and 1978 that do not contain regulated lead-based paint.*”²¹ Not only is the current EPA-approved test kit unreliable, the utility of the kit is further compromised because it cannot be used on drywall or carpeted surfaces, a limitation that makes it nearly impossible for homeowners or contractors to find a cost-effective way to determine whether a property contains lead-based paint. Additionally, NAHB members have reported that they cannot find the test kits, and have been told they are back-ordered and will not be available for another 12 weeks.

Moreover, EPA recently claimed that improved test kits will not be approved by EPA until late 2010, and that the approved test kits will not be commercially available until June 2011.²² Finally, because of the inaccuracies of the current EPA-approved test kits, the majority of the 8.4 million renovation events that occur annually that are subject to EPA’s LRRP Rule will not result in any protection to children, adults, or the environment because lead at levels regulated by the federal government is not present in many of these housing units.²³ The failure to provide a consistently reliable method to determine the presence of lead-based paint, coupled with the millions of dollars that will be needlessly spent while a newer and better test kit is developed and approved is good cause for EPA to immediately delay the effective date of the LRRP Rule.

²⁰ 71 Fed. Reg. 1599.

²¹ *Id.* (emphasis added).

²² U.S. EPA, *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities*, (October 2009), footnote 12.

²³ The number of renovation events estimated here is a reflection of the 2008 LRRP Final rule (73 Fed. Reg. 1588). EPA proposed an amendment to the rule in October 2009 (74 Fed. Reg. 55506), which estimates an additional 5.4 million renovation events will occur in the first year and 3.0 million events will occur after the improved test kits are available if the amendments are finalized as proposed. (U.S. EPA, *Analysis for the TSCA Lead Renovation, Repair, and Painting Program Opt-out and Recordkeeping Proposed Rule for Target Housing and Child-Occupied Facilities*, (October 2009), table ES-3).

5. Threat of Third-Party Lawsuits Real and Immediate: The LRRP Rule was issued pursuant to EPA's authorities and obligations under the Toxic Substances Control Act (TSCA). TSCA specifies the enforcement mechanisms available to EPA under the act.²⁴ Additionally, EPA has considerable discretion over how it exercises its enforcement authority. EPA has already begun developing its enforcement program for the LRRP Rule, with the publication of an *Enforcement Alert*, which summarizes the rules and its requirements.²⁵ Even if EPA were to decide that the rule was a low enforcement priority, TSCA's citizen suit provisions may in fact compel EPA to take aggressive action even in instances where EPA has declined to pursue enforcement.

TSCA allows for citizens to sue a regulated person after providing notice to EPA, so long as the agency has not already commenced an enforcement action against the regulated person. Thus, even if EPA were to exercise its discretion and not actively pursue enforcement actions against remodelers and other contractors alleged to be in violation of any part of the LRRP Rule, an individual could file a lawsuit against the remodeler and enforce EPA's regulation. For example, if a remodeler were unable to attend certified renovator training by April 22, on April 23, anyone meeting TSCA's specifications and constitutional standing requirements could file notice of their intent to initiate a lawsuit to "restrain a violation," which would likely prohibit the remodeler from working on any home built before 1978.

While the citizen suit provisions are problematic for a number of reasons, they are particularly troubling in this instance because critical elements necessary to implement the LRRP Rule are inadequate. Through no fault of the contractors' themselves, the required training is simply not available in many areas. To allow ad-hoc enforcement by citizen groups (or EPA) against a remodeling firm that has not been given the tools it needs with which to comply with a federal mandate runs contrary to public policy and offends principles of common sense and fairness. Such unacceptable results constitute good cause.

NAHB has worked and continues to work diligently and collaboratively with EPA staff, health advocates, and other home building industry groups to

²⁴ 15 U.S.C. §§2615-2616.

²⁵ See, e.g., U.S. Environmental Protection Agency, Office of Civil Enforcement, *Enforcement Alert: Compliance with new Federal Lead-Based Paint Requirements*, EPA 325-F-009-005 (Jan. 2010).

implement the LRRP Rule in an effective and efficient manner.²⁶ NAHB's members understand the importance of their roles and are willing to take the steps necessary to help the agency meet our common goals of eliminating lead hazards in target housing and protecting families and children. However, the current situation of insufficient training and certification capacity, unreliable test kits, and the looming risk of third-party lawsuits is regrettable and will not efficiently or effectively protect against lead-based paint hazards. Moreover, if EPA perseveres with the April 22, 2010 compliance date, thousands of currently employed contractors will be placed in the uncomfortable dilemma of not working or working illegally under the constant threat of TSCA enforcement actions from either EPA or any member of the public. NAHB looks forward to your leadership in alleviating these difficulties and facilitating compliance by issuing an immediate interim final rule to delay the April 22, 2010 effective date of the LRRP Rule found at 40 CFR §745.81.

If you have any questions regarding NAHB's petition please do not hesitate to contact Mike Mittelholzer, Assistant Vice President, Environmental Policy, at (202) 266-8660.

Best regards,



William P. Killmer
Executive Vice President

cc: Mr. Stephen A. Owens,
Assistant Administrator for Prevention, Pesticides, and Toxic
Substances

Ms. Diane Thompson,
Chief of Staff, Office of the Administrator

²⁶ See 74 Fed. Reg. 55511 (October 28, 2009), in which EPA highlighted NAHB's compliance efforts, and recognized that NAHB done a great deal to inform our members and the public about the LRRP rule as well as how to comply.