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Comments Regarding EPA Advanced Notice of Proposed Rulemaking

Lead; Renovation, Repair, and Painting Program for Commercial and Public Buildings

75 Fed. Reg. 24848 (May 6, 2010)

INTRODUCTION

These comments respond to the Advance Notice of Proposed Rulemaking issued by the U.S. Environmental Protection Agency (“EPA”) concerning the Renovation, Repair and Painting Program for Commercial and Public Buildings. 75 Fed. Reg. 24848 (May 6, 2010) (the

to create lead-based paint hazards. Finally, the Agency cannot promulgate any regulations governing RRP activities in commercial and public buildings until it completes the type of study mandated by Congress. Each of these issues is discussed further below.

A. EPA Lacks Statutory Authority to Adopt Requirements for RRP Activities in Commercial and Public Buildings and Can Only Issue Guidelines

Based on the statute's text, EPA lacks authority under TSCA to promulgate regulations governing RRP activities because such requirements would almost certainly be part of work practice standards, which can only be the subject of Agency guidelines. The plain language of TSCA Section 402(a)(1) authorizes EPA "to ensure that individuals engaged in [lead-based paint] activities are properly *trained*; that training programs are *accredited*; and that contractors engaged in such activities are *certified*." 15 U.S.C. § 2682(a)(1) (emphasis added). The statute also grants EPA the authority to create standards for "lead-based paint activities," which are defined in the context of commercial buildings, public buildings constructed before 1978, bridges and other structures to include "identification of lead-based paint and materials containing lead-based paint, deleading, removal of lead from bridges, and demolition." 15 U.S.C. § 2682(b)(1). Work involving renovation, repair and painting is not included under the "lead-based paint activities" definition.

In enacting Section 402(c), Congress was careful to distinguish between lead-based paint activities and RRP activities – and that section does not authorize EPA to promulgate regulations affecting the work practice standards for RRP in commercial and public buildings. Instead, EPA is authorized to "promulgate *guidelines* for the conduct" of RRP activities and to require certification of RRP firms that are engaged in activities that create lead-based hazards. 15 U.S.C. § 2682(c)(1) and (3). Although the statute also requires EPA, after undertaking a study, to revise the regulations developed for abatement and other lead-based paint activities to apply to RRP activities, Congress intended that EPA would apply the appropriate certification requirements developed in connection with lead-based paint activities to RRP contractors but that work practice standards would remain the subject of guidelines, not regulations. 15 U.S.C. § 2682(c)(3). *See, e.g., Spears v. U.S.*, 129 S. Ct. 840, 842 (2009) ("[T]he cocaine Guidelines, like all other Guidelines, are advisory only." (emphasis added)), (quoting *Kimbrough v. U.S.*, 128 S. Ct. 558, 560 (2007)); *Brock v. Cathedral Bluffs Shale Oil Co., et al.*, 796 F.2d 533, 537 (D.C. Cir. 1986) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent proceedings....A properly adopted substantive rule establishes a standard of conduct which has the force of law....A general statement of policy, on the other hand, does not establish a "binding norm.""), (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

This plain reading of the statute is supported by the fact that the provision requiring EPA to engage in a study prior to promulgating regulations for RRP activities (Section 402(c)(2)) is entitled "Study of certification" and the provision concerning subsequent promulgation of regulations (Section 402(c)(3)) is headed "Certification determination." *See I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) (section titles can serve as aids to the construction of statutory language where the language is ambiguous); *see also Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (the title of a section is an indication of its meaning). In contrast to the

preceding provision concerning guidelines for work practice standards, the focus of Section 402(c)(2) and (3) is the certification of contractors. Therefore, the focus of rulemaking development under Section 402(c)(3) must be on certifications of contractors. Any attempt by EPA to require contractors to comply with work practice standards in public and commercial buildings is beyond EPA's statutory authority.

Based on EPA's statements in the ANPRM, it appears that the Agency is considering implementing regulations similar to the Residential RRP Rule at least for external RRP activities at commercial and public buildings. *See* 75 Fed. Reg. at 24855. Under its statutory authority, EPA can only issue such standards as guidelines and not regulatory requirements.

B. EPA Lacks Authority to Regulate Activities Unless Those Activities Disturb Lead and Create a Lead-Based Paint Hazard

The regulations contemplated in the ANPRM also exceed EPA's statutory authority because EPA has not established that the RRP activities it seeks to regulate in commercial and public buildings create any lead-based paint hazards. TSCA Section 402(c)(3) requires EPA to promulgate regulations with respect to RRP activities only where such activities create a lead-based paint hazard. The statute does not provide specific authorization to EPA to regulate RRP activities that disturb lead but do not create a lead-based paint hazard. 15 U.S.C. § 2682(c)(3). Consequently, from that silence EPA lacks authority to regulate RRP activities unless they create a lead-based paint hazard. *See, e.g., In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (where Congress knows how to say something but chooses not to, its silence is controlling).

In order to regulate RRP activities in commercial and public buildings, EPA would need to show that such activities create a lead-based paint hazard. Without more information than it currently has regarding RRP activities specifically in the commercial and public settings, EPA cannot show that such activities create a lead-based paint hazard. Indeed, EPA acknowledges in the ANPRM that it does not have enough information to conclude that specific RRP activities in commercial and public buildings create a lead-based paint hazard. *See* 75 Fed. Reg. at 24857 and 24859.

Based on statements in the ANPRM, EPA apparently plans to draw upon the findings it made in the Residential RRP Rule to determine th

In any event, as a general matter, most RRP activities either eliminate or reduce the potential for future lead-based paint hazards. For example, the Mercatus Report found that “evidence collected [in EPA’s Study] following the passage of the statute has indicated that lead hazards created by renovation and remodeling work are minimal, and RRP work removes chipping and deteriorating paint – two of the leading causes of elevated blood-lead levels.” *See* Comments of the Regulatory Studies Program, Mercatus Center, George Mason University at 30 (May 25, 2006) (“*Mercatus Report*”).

Other studies reach similar conclusions. A study conducted by the National Association of Home Builders (“NAHB”) explained that “when considering lead dust loading on surfaces throughout a single property, results showed that overall all but one of the properties evaluated showed *lower levels of lead dust when R&R contractors completed the work than when they arrived.*” NAHB, *Lead-Safe Work Practices Survey Project Report 2* (Nov. 2006) (the “*NAHB Report*”).

prerequisite of conducting a congressionally-mandated study regarding RRP activities. Prior to promulgating any regulations involving RRP activ

Any lead-based paint hazard standards must not only allow for a wide variety in exposure patterns of different sub-populations, they must also account for the different vulnerability levels to the dangers of lead-based paint between such sub-populations. Unless EPA can establish that a single set of lead-based paint hazard standards should apply to protect both young children as well as older children and adults, the Agency will need to consider adopting different work practice standards for commercial buildings, such as office buildings or industrial facilities, where young children are expected to be found only infrequently (if at all). Although the ANPRM states it “does not believe that options considered in this rulemaking should be limited to those buildings or situations where young children are likely to be exposed,” EPA also acknowledges that it “continues to believe that it is important to emphasize the deleterious effects of lead exposure on young children, a sub-population that has long been identified as being particularly susceptible to the adverse effects of lead. 75 Fed. Reg. at 24855. Because EPA does not appear to have information suggesting that all RRP activities present the same hazards to all population groups, EPA must determine how to structure any standards to address such differing risks.

In order to better understand both the likelihood of exposure of different sub-populations at specific commercial and public locations, and the need to protect the most vulnerable groups differently from those least susceptible to lead-based paint hazards, EPA should conduct a comprehensive study analyzing RRP activities in different commercial and public buildings. Without this information, it will be impossible for the Agency to craft rational standards to address any potential lead-based paint hazards.

2. Presence of Lead-Based Paint

In evaluating the need for lead-based paint standards in commercial and public buildings, EPA also must consider the fact that, although the use of lead-based paint was not completely banned in all industrial and commercial buildings, the use of such paints has been dramatically limited since the 1978 restriction on the use of lead-based paint in interior and exterior surfaces in housing and other buildings and structures used by consumers. *See* 75 Fed. Reg. at 24856. Industry practice has been to restrict the use of lead-based paints in all but the most industrial of uses dating back to the 1970s. EPA acknowledges that the prevalence of lead-based paint in commercial and public buildings is an important factor in determining whether RRP activities create lead-based paint hazards. 75 Fed. Reg. at 24858. In drafting the 2008 Residential RRP Rule, EPA had access to two national studies evaluating the prevalence of lead-based paint in target housing and daycare centers. *See* 75 Fed. Reg. at 24858. EPA, however, does not have similar information on the prevalence of lead-based paint in commercial and public buildings.

This lack of information in yet another area crucial to EPA’s deliberations again highlights the need for EPA to conduct a comprehensive study of the issues related to lead-based paint in public and commercial buildings. Without such a study, it is impossible for EPA to determine how the reduced amount of lead-based paint in use at commercial and public buildings affects whether RRP activities in such settings create hazards. For example, it may be appropriate to limit the applicability of any work practice standards for RRP activities in commercial buildings to commercial structures that were built before 1978 (as Congress has done with target housing and public buildings). Alternatively, EPA may determine that any

application of work practice requirements to RRP activities in commercial buildings built after 1978 should be limited to the types of post-1978 commercial buildings where lead-based paint is more likely to be found, such as industrial facilities as opposed to office buildings or retail facilities.

Moreover, EPA should consider the areas within commercial and public buildings that may be more likely to have lead-based paint and the potential implications of the patterns for human exposure. For example, in office and retail settings the areas occupied by tenants are often renovated when there is a changeover in tenants. As a result, to 1978 ts are

1926.62(c). It is reasonable to believe that employees are the single largest sub-population that would be affected by exposure to lead-based pa

How would the imposition of certification, training and work practice requirements affect renovation activities in commercial buildings? How would

<http://www.eia.doe.gov/aer/consump.html>. The Pew Center on Climate Change recently reported that lack of funds and financing, especially due to the recession and frozen lending

that encourage deep, whole-building retrofits to component-specific incentives to spur upgrades of building envelope, equipment, and materials. *See, e.g.*, S. 949/H.R. 2212, 21st Century Energy Deployment Technology Act; S. 1574, Clean Energy for Homes and Buildings Act; S. 1637/H.R. 4226, Expanding Building Efficiency Incentives Act; S. 1743/H.R. 3715, Expanding the Rehabilitation Tax Credit; S. 3079/H.R. 5476, Building STAR Energy Efficiency Act; H.R. 426, Green Roofing Energy Efficiency Tax Act; H.R. 1778, Retrofit for Energy and Environmental Performance Act; H.R. 2615, Energy Efficient Commercial Roofs Act; H.R. 3659, Building Tax Credit Act; H.R. 3836, Private Financing for Clean Energy Technology; H.R. 4155, Property Assessed Clean Energy Tax Benefit Act; H.R. 4296, Mechanical Insulation Incentives Act; H.R. 4455, Expanding Industrial Energy Efficiency Incentives Act.

These examples demonstrate that the Obama Administration, leaders in Congress, and state and local governments have all emphasized that increased energy efficiency in our public and commercial buildings is a compelling public policy objective. Based on the information provided in the ANPRM, EPA has not sufficiently considered how such energy efficiency initiatives will be impacted by contemplated RRP regulations on lead-based paint in commercial and public buildings.

There is a clear relationship between energy efficiency projects and commercial renovation lead-based paint rules. More than 75 percent of buildings that exist in urban areas today will still be standing in 2030, and these are the exact buildings that will benefit the most from energy retrofit projects in terms of reduced and more efficient energy consumption. *See* <http://www.ashrae.org/aboutus/page/2372>. But such building rehabilitations are also the same projects that are likely to trigger the potential exterior and interior RRP rules currently contemplated by EPA. These RRP rules could likely impose regula

2010 to the lowest total in fourteen years (since July 1996); while the industry's unemployment rate remained at 20.1 percent. New regulatory hurdles will only add road-blocks in the construction industry's path to economic recovery and the nation's path towards energy efficiency.

These potential conflicts also highlight the need for early, frequent, and substantive coordination and input from the White House, other EPA divisions, sister agencies, and congressional offices to ensure that potential RRP regulations in commercial and public buildings do not subvert significant national priorities such as energy efficiency initiatives.

CONCLUSION

The Coalition appreciates the opportunity to submit these comments. The Coalition members look forward to working with the Agency as it moves forward with its rulemaking process for RRP activities in public and commercial buildings.