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Document Control Office (7407M)
Office of Pollution Prevention and Toxics (OPPT)
Environmental Protection Agency
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RE: EPA Regulatory Docket Number EPA-HQ-OPPT-2005-0049

Dear Sir or Madam:

On behalf of the American Architectural Manufacturers Association, the Associated General Contractors, the Institute of Real Estate Management, the National Association of the Remodeling Industry, National Association of REALTORS®, the National Lumber & Building Material Dealers Association, the Painting & Decorating Contractors Association, Plumbing-Heating-Cooling Contractors Association, Real Estate Roundtable, the Vinyl Siding Institute, and the Window and Door Manufacturers Association, please find attached our comments on the U.S. Environmental Protection Agency's proposed amendments to the rule for the Renovation, Repair and Painting ("RRP") Program as it applies to target housing and child-occupied facilities (the "Rule"). EPA has proposed amendments to the Rule - published in the Federal Register (Volume 75, No. 87) on May 6, 2010 - to require dust wipe testing and clearance testing in specified circumstances. The proposed amendments suffer from several different flaws, each of which individually mandate that the proposed amendments be withdrawn.

First, EPA lacks the authority under the Toxic Substances Control Act ("TSCA") to impose dust wipe testing or clearance testing requirements on renovators. Rather, the Agency has statutory authority only to suggest guidelines for the conduct of RRP activities. The proposed amendments to the Rule would go beyond the boundaries of guidelines and impose work practice standards for RRP activities. Further, EPA has not established that all the RRP activities being regulated create lead-based paint hazards. While RRP activities may disturb lead-based paint, no evidence has been presented to support a finding that a hazard would automatically result from such activities. Similarly, EPA has not satisfied the statutory requirement of conducting a "study of certification" to determine which, if any, RRP activities create lead-based paint hazards. Consequently, EPA has failed to establish a necessary predicate for the regulation of RRP activities.

Second, EPA's proposed amendments to the Rule are inconsistent with TSCA because they eliminate the distinction between abatement and renovation. The proposed amendments would effectively transform renovators performing RRP activities into abatement

contractors. The dust wipe testing and clearance testing, as contained in the proposed amendments, would require renovators to remove all lead hazards from a work site regardless of whether the lead hazard was present before the RRP activities began. The dust wipe tests and clearance tests require the renovator to perform abatement-type work even after Congress has been careful to distinguish RRP activities from abatement activities. If the proposed amendments go into effect, renovators, while obligated not to create lead-based paint hazards, would be under an untenable duty to abate lead-based paint hazards that preexist the RRP activities.

Third, EPA has acted in an arbitrary and capricious manner in imposing dust wipe testing and clearance testing requirements through the proposed amendments to the Rule. Under previous versions of the Rule, dust wipe testing and clearance testing were not required because of cost and liability concerns. EPA explicitly considered the cost and liability factors, among others, when it declined to include dust wipe testing and clearance testing requirements in the Rule previously. EPA has now changed course without offering a reasoned explanation, such as new data or circumstances, to justify its decision. Further, the amendments only exacerbate issues relating to: (1) the costs for renovators to comply with the proposed amendments, and (2) the liability that will effectively be imposed on renovators that do not abate preexisting lead-based paint hazards. In addition, any benefits provided by the proposed amendments would be minimal because the existing cleaning verification requirements have been deemed effective by EPA. Finally, the unintended harm resulting from proposed amendments would outweigh any benefits it provides because people who would be priced out of hiring a licensed, professional renovator to perform RRP activities will likely perform such work themselves or hiring unlicensed contractors, thereby increasing the likelihood that a renovation project would result in the creation of lead-based paint hazards.

Fourth, EPA has violated the Regulatory Flexibility Act in proposing amendments to the Rule without convening a new Small Business Advocacy Review Panel. The Regulatory Flexibility Act requires that such a panel convene when a rule is promulgated that will have a significant economic impact on a substantial number of small entities. This obligation is also triggered when an existing rule is amended. By adding the dust wipe testing and clearance testing requirements to the Rule, EPA will profoundly impact numerous small entities. The failure to convene a Small Business Advocacy Review Panel to review the proposed amendments is a violation of clear, binding statutory authority.

The groups represented by this letter and attached comments support efforts to reduce the incidence of lead exposure, but are troubled that the proposed amendments are not tailored to meet that goal. The attached comments fully outline the concerns of these trade associations and their belief that the Rule, as it currently stands, effectively and efficiently protects the public from lead exposure. Of course, industry members are always open to additional ways in which to better protect the public. Unfortunately, the proposed amendments to the Rule do little in that regard yet would impose considerable costs.

If you have any questions, please contact me at (202) 639-7710.

BAKER BOTTS LLP

- 3 -

Sincerely,

A handwritten signature in black ink that reads "Thomas C. Jackson". The signature is written in a cursive style with a large, prominent initial "T".

Thomas C. Jackson

Enclosure

**COMMENTS REGARDING EPA'S PROPOSED AMENDMENT TO THE
LEAD; RENOVATION, REPAIR AND PAINTING RULE¹**

In 1992 Congress passed the Residential Lead-Based Paint Reduction Act, commonly referred to as "Title X." Pub. L. 102-550, tit. X (codified in part at 15 U.S.C. §§ 2681-92). Among other things, that title added a new Subchapter IV to the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* ("TSCA"), and as part of that subchapter directed the U.S. Environmental Protection Agency ("EPA") to develop regulations to reduce exposure to lead by enacting requirements for individuals involved in maintenance, remodeling and construction activities in certain types of buildings, including "target housing." 15 U.S.C. § 2682. "Target housing" is defined, with some exceptions, as "any residential structure built prior to 1978 where a child under six resides or is likely to reside." *See* 42 U.S.C. § 4851b(27).

In April 2008, EPA published its regulation concerning the Lead Renovation, Repair and Painting program for renovation, repair and painting ("RRP") activities in target housing. 73 Fed. Reg. at 21692 (April 22, 2008) (the "Rule" or "LRRP Rule"). The purpose of the Rule is to "reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint." *Id.* Under the Rule, new requirements for renovation work practices were established. The renovation work practices include a requirement that renovators engage in what EPA refers to as "cleaning verification" to ensure that the work area has been cleaned in accordance with the requirements set forth in the Rule. 71 Fed. Reg. at 1613-14. The verification procedure includes both a visual inspection of the work area after the required cleaning steps have been conducted as well as the use of a "white glove" test. *Id.* at 1630. These work practice requirements apply to all commercial enterprises engaging in RRP activities but do not apply to homeowners who conduct RRP activities themselves. *Id.* at 1602.

For the second time in less than two years, EPA has proposed changes to the Rule. *See* 75 Fed. Reg. 24802 (May 6, 2010), 40 C.F.R. §§ 745.81 - 745.82; *see also* 75 Fed. Reg. 25038 (May 6, 2010). "Specifically, EPA is proposing to require dust wipe testing after many renovations covered by the Rule." *Id.* at 25039. EPA is also proposing requirements for clearance testing in some instances, as well as requirements related to training, certification and accreditation. *Id.* However, the proposed amendments to the Rule regarding dust wipe testing and clearance testing suffer from a number of serious legal deficiencies and should be reconsidered by the Agency.

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

There are several key respects in which the proposed amendments to the Rule, to the extent they include requirements for any form of dust wipe testing or clearance testing, would

¹ These comments are submitted on behalf of the following groups: American Architectural Manufacturers Association (AAMA), the Associated General Contractors (AGC), the Institute of Real Estate Management (IREM), the National Association of the Remodeling Industry (NARI), National Association of REALTORS® (NAR), the National Lumber & Building Material Dealers Association (NLBMDA), the Painting & Decorating Contractors Association (PDCA), Plumbing-Heating-Cooling Contractors Association (PHCC), Real Estate Roundtable (RER), the Vinyl Siding Institute, and the Window and Door Manufacturers Association (WDMA).

exceed the statutory authority Congress granted to EPA under Title X. For the reasons set forth below, EPA should withdraw its proposal to add these requirements in light of the limits on its authority.

A. EPA can only issue guidance concerning renovation work practices²

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

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

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

² Lead-safe work practices do provide health and safety benefits. However, EPA is without the authority to require such practices. Nevertheless, contractors that comprise the regulated community endeavor to use work practices that protect human health and the environment.

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

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

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

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

Other studies have reached similar conclusions. NAHB's own study noted that "when considering lead dust loading on surfaces throughout a single property, results showed that overall all but one of the properties evaluated showed *lower levels of lead dust when R&R contractors completed the work than when they arrived.*" NAHB, *Lead-Safe Work Practices Survey Project Report 2* (Nov. 2006) (the "*NAHB Report*") (emphasis added). Moreover, the Wisconsin Department of Health and Family Services ("WDHFS") noted that "our experience in Wisconsin is that *professional renovation is rarely the cause of lead poisoning in children.*" Wisconsin Department of Health and Family Services, *Comments: Lead; Renovation, Repair, and Painting Program; Proposed Rule* (emphasis added).

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

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

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

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

- Phases I and II of the Study "failed to find a connection between elevated blood-lead levels and workers' exposure to considerable amounts of lead-contaminated dust;" and
- "[T]he Wisconsin [Phase III] study cannot claim that any RRP work increases the risk of elevated blood-lead levels in children."

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

Several members of the peer review panel involved in evaluating the Study also raised concerns about various aspects of the methodologies employed. For example, EPA reported that "[i]n regard to the Wisconsin blood-lead registry, another issue of concern among the reviewers was how representative the registry is of the state population." *See* Phase IV Report at 1.3. However, the Study failed to adequately address these and other concerns. In other words, contrary to EPA's conclusions, the Agency's own Study failed to show that

unregulated RRP activity contributed to increased blood-lead levels in *either* RRP workers or in children residing in homes that were being remodeled. NAHB likewise pointed out in its prior comments to EPA that “the studies cited do not illustrate a definitive link between renovation and remodeling activities and lead poisoning in children.” See NAHB LRRP Rule Comments, Section II(B).

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

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

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

The legislative history of Title X supports the conclusion that Congress believed RRP activities and lead-based paint activities were distinct and that each required a different level of government regulation. For example, the Senate Committee on Banking, Housing and Urban Affairs recognized that not all RRP activities would create lead-based paint hazards and that, unlike lead-based paint activities (risk assessment, inspection, abatement), not all RRP activities would require the use of certified workers. As the Committee stated:

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

will not require certified workers because it will not involve significant dust generation or the disturbance of painted surfaces.

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

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

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

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

EPA itself has recognized that abatement activities and renovation differ in fundamental respects. In issuing the LRRP Rule, the Agency acknowledged that “[t]he purpose of an abatement project is to permanently eliminate lead-based paint and lead-based paint hazards.” 71 Fed. Reg. at 1613. As a consequence, EPA concluded, it is “perfectly appropriate” to require an abatement contractor to undertake testing once the work is completed to ensure that the lead-based paint hazards have in fact been eliminated. *Id.* In contrast, EPA recognized that “renovations may be performed for many reasons, most of which have nothing to do with eliminating lead-based paint hazards.” *Id.* at 1613-14. The Agency further recognized that “if clearance testing using dust wipes were required after every renovation job, it could have the effect of holding the renovation firm responsible for abating all lead dust hazards, including such hazards that may have existed in the area before the renovation commenced.” *Id.* at 1614.

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

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

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

Even if EPA had authority under the statute to impose clearance testing and other requirements on renovators, EPA's proposed amendments would still be legally deficient because they are arbitrary and capricious. As the U.S. Supreme Court has stated, an agency's decision will be vacated if it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007). Moreover, EPA must articulate an explanation that includes "a rational connection between the facts found and the choice made." *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 952 (D.C. Cir. 2007). A court should uphold EPA's action only if the court can discern a "reasoned path" from the facts and considerations before the Agency to the decision it reached. *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1187 (D.C. Cir. 1996) (*per curiam*).

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

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

When changing a final rule, an agency must provide a reasoned explanation for the change. *See C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1561 (D.C. Cir. 1991); *see also Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (stating that an agency may change its past practices, especially under changed circumstances, so long as it provides a reasoned explanation for its action). If an agency fails to explain its reassessment, then the courts will decline to find that the agency had an adequate basis for its decision. *Fox*, 931 F.2d at 1561. In amending the Rule to include dust wipe testing and clearance testing requirements, EPA has reversed course without citing any data or other information that has

come to light since April 2008 that casts doubt on its prior position. *See* 75 Fed. Reg. at 25057 (References). Rather, it appears that the Agency simply changed its mind even before it implemented the Rule as the result of the settlement of a lawsuit. *See* 75 Fed. Reg. at 25044. In the absence of a reasoned explanation for the change in the Rule regarding dust wipe testing and clearance testing, the Agency's decision is arbitrary and capricious.

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

EPA gave "significant weight to the cost . . . and liability concerns" in crafting the Rule. *See* 75 Fed. Reg. at 25046. In proposing to amend the Rule, EPA concedes that the imposition of dust wipe testing and clearance testing will make renovation and remodeling activities more expensive. *See* 75 Fed. Reg. at 25044 ("EPA also recognized that dust wipe testing and clearance as required after abatements can be expensive."). Further, the Agency acknowledges that the amendments will prompt renovation and remodeling contractors to take measures to protect themselves against future liability. *Id.* at 25045 (noting that EPA considered the "white glove" method an alternative to clearance in order to protect contractors against liability for pre-renovation dust). However, EPA has not adequately explained why it reached a different conclusion on dust wipe testing and clearance testing when the factors to be balanced remained unchanged. *See id.* at 25046. ("EPA has continued to balance these considerations in today's proposal, but has preliminarily concluded that, for certain jobs, the additional benefits of dust wipe testing, and in some cases clearance, warrant imposing these additional requirements."). Such a course of action is arbitrary and capricious.

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

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

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

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

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

As EPA has recognized, Section 402 does not grant it authority to regulate home owners or occupants who choose to perform their own renovation activities.³ Nor does Section 402 authorize EPA to disseminate information to owners and occupants. Thus, Section 402 and its implementing regulations⁴ fail to provide EPA with any authority to provide information to residents or change residents' behavior under Section 402.

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

⁴ *E.g.*, 73 Fed. Reg. 21692 (Apr. 22, 2008).

Instead, Congress has provided two methods for information dissemination to owners and occupants, including Section 1018, which is discussed above. The other statutory mechanism for providing information to residents regarding lead-based paint hazards is found in TSCA Section 406. That provision requires EPA to produce an informational pamphlet describing lead-based paint hazards that may be present in a home built before 1978, the risks these hazards pose to occupants of the property, the role renovation may play in creating these risks, methods for evaluating and reducing hazards, and information on how to locate contractors that specialize in lead-based paint hazard evaluation and reduction. *See* TSCA, § 406(a). Then, Congress specifies the method for dissemination of this pamphlet – “each person who performs for compensation a renovation of target housing [must] provide a lead hazard information pamphlet to the owner and occupant of such housing prior to commencing the renovation.” TSCA, § 406(b). However, there is no mention of any other form of information dissemination within Section 406(b), and Section 402 is silent on the issue. Long-standing rules of statutory interpretation clearly state that where Congress “knows how to say something but chooses not to, its silence is controlling.” *In re Hass*, 48 F.3d 1153, 1156 (11th Cir. 1995); *see also discussion infra*, p. X.

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

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

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

As noted above, visual inspections following a typical post-project cleanup are extremely effective and, according to EPA’s own Study, typically reduce the lead concentration in a home by over 99%. While this method of inspection is effective, simple and inexpensive, dust wipe testing and clearance testing are more time-consuming and more expensive. It would

be arbitrary and capricious for EPA to require more expensive and complicated dust wipe testing and clearance testing that would provide little additional benefit as opposed to a simpler, more effective, and less expensive visual test, especially after EPA itself has admitted the many drawbacks associated with these proposed requirements.

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

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

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

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

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

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

even the amendment of an existing rule – that would result in a significant economic impact on a substantial number of small entities. For example, EPA convened a SBAR Panel to review proposed changes to existing regulations related to the certification of pesticide applicators. *See EPA, Panel 33b: Certification of Pesticide Applicators (Revisions)*.

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

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