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Mr. John Yowell
National Program Chemicals Division
Office of Pollution Prevention and Toxics
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460-0001

RE: Review of Dust-Lead Hazard Standards and Definition of Lead-Based Paint; Proposed Rulemaking, 83 Fed. Reg. 30889 (July 2, 2018) - **Docket ID No. EPA-HQ-OPPT-2018-0166**

Dear Mr. Yowell:

The Associated General Contractors of America (AGC) submits these comments in response to the U.S. Environmental Protection Agency's (EPA) [proposed rulemaking](#) on the achievability and appropriateness of the agency's proposal to lower the dust-lead hazard standards (DLHS) set by the LBP Hazards Rule.¹ EPA is asking for input on other alternative ranges, including keeping the DLHS at the current levels. This proposal would not change the clearance levels under EPA's regulations. In addition, EPA is proposing to retain the current definition of lead-based paint (LBP) as jointly promulgated by EPA and the U.S. Department of Housing and Urban Development (HUD) in their 1996 "Disclosure Rule."²

AGC is the leading association for the construction industry. AGC represents more than 27,000 firms, including more than 6,500 of America's leading general contractors, and over 8,900 specialty-contracting firms. More than 11,500 service providers and suppliers are associated with AGC through a nationwide network of chapters.

AGC's members engage in the construction of commercial buildings, hospitals and laboratories, schools, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, levees, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development. For the types of vertical projects listed above, AGC Building Contractors offer a wide variety of pre-construction services (e.g., planning and estimating) and post-construction services (e.g., operations and maintenance), as well as traditional general contracting services that include new builds, renovations, remodels and retail build-outs. AGC Specialty Contractors perform drywall, painting, window replacement, plumbing, heating and air-conditioning, electrical and carpentry work. Some AGC builders also perform demolitions. In the ordinary course of business, some activities may be regulated under EPA's lead-based paint program, particularly as those programs apply to child-occupied facilities (COFs or pre-1978 non-residential properties where children under the age of 6 spend a significant amount of time such as daycare centers and kindergartens).

¹ See 66 Fed. Reg. 1206, Jan. 5, 2001.

² See 61 Fed. Reg. 9064, March 6, 1996.

Background

The new proposed standards for lead-contaminated dust on floors and window sills would modify the hazard levels used in EPA's Lead-based Paint Activities³ and Disclosure programs. Those programs apply only to target housing (i.e., most pre-1978 housing) and pre-1978 COFs. Apart from COFs, no other public and commercial buildings are covered by this rule. EPA notes that revising the DLHS will not trigger new requirements under EPA's 2008 Lead Renovation, Repair and Painting Rule⁴ because that rule does not require dust sampling prior to or at the end of a renovation, as further explained below.

Specifically, EPA's proposal would lower the DLHS for floors from 40 to 10 micrograms per square foot and for window sills from 250 to 100 micrograms per square foot.⁵ If finalized, EPA would require risk assessors (who must be trained and certified) to use the lower DLHS limit to determine whether LBP hazards are present, through the collection of dust samples from floors and window sills.⁶ The samples are sent to a lab for analysis. EPA states in the *Federal Register* preamble: "Sampling results above the new hazard standard would indicate that a dust-lead hazard is present on the surfaces tested. EPA expects that this would result in more hazards being identified in a portion of target housing and COFs that undergo risk assessments. The proposed rule does not change any other risk assessment requirements."

EPA also states: "The DLHS do not require the owners of properties covered by this proposed rule to evaluate their properties for the presence of dust-lead hazards, or to take action if dust-lead hazards are identified."

EPA's and HUD's Disclosure Rule requires prospective sellers and lessors of most pre-1978 housing to: disclose the presence of any known LBP and LBP hazards to purchasers and renters; provide them with a federally-approved lead hazard information pamphlet; and provide any available records or reports "pertaining to" LBP, LBP hazards and/or any lead hazard evaluative reports (even reports showing dust and soil levels below⁷ the hazard standard). As such, under a lower DLHS, property owners would not be required to disclose more information, because they are already disclosing any results that show dust-lead below 40 µg/ft² on floors or below 250 µg/ft² on window sills. However, a lower hazard standard may prompt a different response on the lead disclosure form.

The proposal would not amend the post-abatement dust lead clearance levels.⁸ EPA states in the *Federal Register* preamble that it "intends to review the clearance levels at a later date," and indicates

³ EPA's Lead Abatement Program regulations provide a framework for lead abatement, risk assessment, and inspections. Lead abatement is an activity designed to permanently eliminate lead-based paint hazards.

⁴ 40 CFR Part 745, Subpart E. The Lead RRP rule covers a lot of construction jobs: renovations, repairs, remodeling, demolition, painting, window replacement, plumbing, electrical work, heating and air-conditioning work, etc. The Lead RRP rule establishes requirements for firms *and* individuals performing work that can disturb lead-based paint and create hazardous lead dust and chips.

⁵ The current numerical dust-lead hazard standard levels are codified at [40 CFR 745.65\(b\)](#).

⁶ See [40 CFR 745.227\(h\)\(3\)\(i\)](#) (hazard determination requirements).

⁷ The one exception is that the lessor of target housing is not required to disclose where the housing has been found to be LBP free by a certified inspector (24 CFR 35.82; 40 CFR 745.101).

⁸ After conducting LBP abatements, EPA's regulations require a certified inspector or risk assessor to sample the abated area. If the sample results show dust-lead loadings equal to or exceeding the applicable clearance level,

that “[it] does not want to set a standard that cannot be reliably achieved using existing technology.” EPA acknowledges that “HUD uses the [DLHS] standards proposed here in their clearance regulations and lead hazard control grant requirements ... and considered how this approach would impact partner agencies.” Citing similar science concerns (extending to the data and models underlying the science that is publicly available at this time), the proposal would retain the current definition of LBP.

Definition of Lead Paint

Due to significant data gaps that are clearly outlined in the *Federal Register* preamble, EPA cannot evaluate and subsequently determine whether a change to the existing definition of lead paint is warranted.⁹ AGC agrees that the agency lacks enough information to reach any conclusion at this time.

- EPA needs to establish a statistically valid causal relationship between concentrations of lead in paint (lower than the current definition) and dust-lead loadings which cause lead exposure.
- EPA needs to understand how capabilities among various LBP testing technology would be affected under a possible revision to the definition.
- EPA needs to further explore the availability and application of statistical modeling approaches that establish robust linkages between the concentration of lead in paint below the current definition and floor dust and BLL before EPA could develop a technically supportable proposal to revise the definition of LBP.
- EPA needs more information on whether portable field technologies (that are used in EPA’s lead programs to determine the presence of LBP) would perform reliably at significantly lower concentrations of lead in paint. For example, XRF analyzers and their corresponding performance characteristic sheets, which are the primary analytical method for inspections and risk assessments, were developed to be calibrated with the current definition of LBP. Likewise, the reliability of EPA-recognized lead test kits, used for the Lead RRP program, were evaluated using the current definition of LBP.

According to EPA, “new approaches ... would need to be devised to address [these data gaps],” which has prompted the agency to solicit “new available data on the technical feasibility of a revised definition of LBP or analysis of the relationship between levels of lead in paint, dust and risk of adverse health effects.” This is the appropriate course of action at this time.

The regulated community uses XRF analyzers for inspections and risk assessments, and lead test kits to determine the presence of LBP during renovations. In consideration of any potential revised definition of LBP, EPA would need to fully understand the repercussions of such a revision on these portable field technologies in order to ensure the technological feasibility of any new revision. The methods EPA would need to employ to do so would involve complex processes that include evaluating the potential ability of XRF analyzers to detect LBP at lower levels than the current definition, the ability to recalibrate PCS sheets for each available model of XRF analyzer, and re-evaluating lead test kits under controlled

“the components represented by the failed sample shall be recleaned and retested.” See [40 CFR 745.227\(e\)\(8\)\(viii\)](#) (clearance after abatement). Abatement is not complete until the dust-lead loadings in the work area are below the clearance levels.

⁹ EPA standards currently define lead-based paint as: Any paint or surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter (mg/cm²) or 0.5 percent by weight.

conditions in a laboratory. EPA states in the *Federal Register* preamble that it “currently lacks sufficient information to support such an undertaking.”

The definition of LBP is incorporated throughout EPA’s LBP regulations, and application of this definition is central to how EPA’s LBP program functions. Scope and applicability of the definition of lead-based paint applies not only to EPA’s Lead-based Paint Activities and Disclosure programs (discussed above), but it is also the definition renovators must consider when evaluating applicability of EPA’s Lead Renovation, Repair and Painting (RRP) rule, which is discussed further below. Specifically, EPA’s 2008 Lead RRP rule¹⁰ applies to *anyone* who is paid to perform work that disturbs lead paint in pre-1978 target housing and COFs, including:

- General contractors,
- Maintenance workers and handymen, and
- Painters, carpenters, plumbers, electricians and most specialty trades.

These individuals might be working for rental property owners, schools, daycare providers, non-profits groups or governmental agencies, for example. This underscores how important it is for EPA to carefully consider both the feasibility and health effects of any specific proposed change to the definition of LBP.

Post-Abatement Dust Clearance Levels

AGC’s supports EPA’s decision to collect more data and information before deciding whether to propose changes to the post-abatement dust clearance levels. It is important that EPA assess whether the lower dust-lead loadings proposed in this rule are reliably detectable by all the laboratories already accredited by EPA to accurately analyze paint chips, dust, or soil samples for lead.

The fact that HUD uses the DLHS at issue in this proposal in its clearance regulation does not provide sufficient grounds for EPA to follow suit. EPA must demonstrate independently whether the lower dust-lead loadings proposed in this rule are reliably detectable by laboratories. As EPA explains in the *Federal Register* preamble, the National Lead Laboratory Accreditation Program (NLLAP) sets the minimum requirements that a laboratory must meet to attain EPA recognition as an accredited lead testing laboratory --- meaning the lab has demonstrated the ability to accurately analyze paint chips, dust, or soil samples for lead. Some of the labs accredited under EPA’s NLLAP program have proven their ability to accurately measure dust samples at the lower levels because of their affiliation with HUD’s program; however, this sampling does not represent all of the laboratories accredited under EPA’s NLLAP program. EPA appropriately recognized in the preamble the scenario that must be avoided: “If, as a result of lowering the DLHS, laboratories recognized by the NLLAP program were unable to accurately measure dust samples at those lower levels, then stakeholders would be unable to use those laboratories in conducting activities required by EPA’s LBP program.”

What is more, as discussed in detail above, it is currently unknown whether portable field technologies utilized in EPA’s LBP Activities and RRP programs, perform reliably at significantly lower concentrations of lead in paint.

¹⁰ See *supra* note 4.

Lead Renovation, Repair and Painting (RRP) Program

EPA notes that revising the DLHS will not trigger new requirements under the 2008 [Lead RRP rule](#).¹¹

EPA currently requires comprehensive Lead-safe RRP work practices where LBP is present (or assumed to be present) on most renovation, repair and painting jobs in regulated homes and buildings; these work practices are not predicated on dust-lead loadings exceeding the hazard standards. The current RRP regulations do not require dust sampling prior to or at the conclusion of a renovation and, therefore, will not be directly affected by a change to the DLHS.

At the end of each RRP job, the Certified Renovator is required to perform a “cleaning verification” to make sure they cleaned up properly. The Certified Renovator must visually inspect the work area to confirm that it is free of dust, debris, or residue. For interior projects, the protocol further requires the contractor to use disposable cleaning cloths to wipe the floor and other surfaces of the work area and compare these cloths to an EPA-provided cleaning verification card to determine if the work area was adequately cleaned. Cleaning verification may only be performed by an EPA Certified Renovator if renovations covered by the LRRP rule were performed.

In August 2011, EPA determined that it would not promulgate clearance and dust wipe testing requirements for renovations covered by the 2008 Lead RRP rule.¹² In the *Federal Register* preamble for that rulemaking determination, EPA explained that it does not interpret its statutory mandate under TSCA section 402(c)(3) as simply expanding the scope of the Lead-based Paint Activities rule (which requires the abatement contractor to achieve clearance, as described above) to also cover renovation activities. EPA correctly interpreted its statutory authority and Congress’ intent for it to adapt its lead paint regulations to a different set of activities (renovations that are performed for many reasons often having nothing to do with LBP versus abatements that are performed only to permanently eliminate LBP and LBP hazards) and a very different regulated community. EPA also appropriately considered the costs of dust wipe testing and clearance, the potential delay in obtaining results, and the likelihood that renovation firms would become liable for pre-existing dust-lead hazards. If EPA had required dust wipe testing and clearance after every renovation project, it would have made up a significant portion of the cost of smaller projects. AGC strongly agrees with EPA that the current suite of RRP work practices effectively minimizing exposure to dust-lead hazards created by renovations and ensure that renovators undertake traditional renovation activities—e.g., removal or modification of existing surfaces, containment and cleanup of dust and debris, and ensuring the job site is cleaned up—in a lead-safe way.

Lead Dust Hazard Standard

The proposal does not specifically address how the rule would apply to target housing and COFs where the property owner currently has in hand documentation in the form of records or reports that show dust and soil levels below the currently regulated thresholds 40 µg/ft² on floors or below 250 µg/ft² on

¹¹ See *supra* note 4.

¹² Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair and Painting Program, 76 Fed. Reg. 47918 (Aug. 5, 2011) - <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2005-0049-1434>.

window sills. What legal liability does the property owner/manager face if, after EPA finalizes a lower DLHS, an incident of an elevated blood lead level triggers the call for an inspection and assessment?

In the *Federal Register* preamble, EPA states: “The DLHS do not require the owners of properties covered by this proposed rule to evaluate their properties for the presence of dust-lead hazards, or to take action if dust-lead hazards are identified.” Therefore, AGC urges EPA to clearly indicate that a newly promulgated LDHS would not be retroactively applied to facilities that have documented compliance with the existing standard.

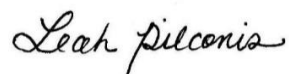
Conclusion

EPA’s acknowledgement of the data gaps and how that impacts the agency’s ability to evaluate and/or change the existing definition of lead paint is in keeping with EPA’s broader effort to ensure... “[t]he best available science ... serve[s] as the foundation of EPA’s regulatory actions,”¹³ an effort which AGC supports and urges the agency to act on immediately. In this separate rulemaking,¹⁴ EPA is proposing to standardize how it approaches the scientific data it uses to inform regulatory decision-making, in brief, to make that information publicly available (within the limits of law) thereby improving transparency and the integrity of the scientific data.

As a member of EPA’s Smart Sectors Program, AGC values being engaged in the agency’s national lead initiatives. AGC and other real estate/development groups met with EPA on April 9, 2018, to discuss lead-based paint regulatory developments and, more specifically, EPA’s focus on further reducing childhood lead exposure. At our request, EPA representatives have provided educational materials at AGC’s annual Construction Environmental Conference to educate on Lead RRP requirements and safe work practices to help contractors meet all environmental requirements and help reduce lead exposures. The association and EPA also provide related resources on the Construction Industry Compliance Assistance Center online at www.cicacenter.org; a free online resource jointly supported by AGC and EPA.

AGC appreciates this opportunity to provide feedback on agency’s proposal to lower the DLHS set by the LBP Hazards Rule. If you have any questions or need additional information, please contact me, Leah Pilconis, directly at pilconisl@agc.org or (703) 837-5332.

Respectfully submitted,



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¹³ See U.S. EPA, Strengthening Transparency in Regulatory Science, Proposed Rule, *Fed. Reg.* 09,078 (April 30, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OA-2018-0259-0001>.

¹⁴ *Ibid.*