



Statement of the
National Lumber and Building Material Dealers Association

on

Review of the 2008 Lead Renovation, Repair and Painting Program;
(EPA-HQ-OPPT-2016-0126)

September 7, 2016

**Comments on Review of the 2008 Lead Renovation, Repair and Painting Program;
(EPA-HQ-OPPT-2016-0126)**

The National Lumber and Building Material Dealers Association (NLBMDA) represents over 5,000 building material retailers nationwide who operate single and multiple lumber yards and component plants serving homebuilders, subcontractors, general contractors, and consumers in the new construction, repair and remodeling of residential and light commercial structures. Safety remains a priority for NLBMDA and supports the Environment Protection Agency's (EPA) efforts to impose reasonable minimum work practice standards.

Most of our dealer members perform installed sales for their customers, including work on homes built before 1978, which are subject to the EPA on the Lead: Renovation, Repair, and Painting rule. Our members who perform work on pre-1978 homes either directly employ remodelers who are certified to perform RRP activities or contract with remodelers who are certified to perform RRP work.

NLBMDA appreciates the opportunity to provide comments to EPA on the Lead: Renovation, Repair, and Painting (RRP) rule as part of a Section 610 Review, which under the Regulatory Flexibility Act requires federal agencies to review regulations that may have a significant economic impact on small businesses, and if so determine if they can be changed to make them more effective or less burdensome in achieving the stated objectives.

The intent of the RRP rule to prevent lead exposure in young children is well-founded as even low levels of lead exposure can have serious long-term health consequences. However, there have been steps taken in both the rulemaking process and administration of the rule that have raised concerns about the program. In the past, the EPA has made notable efforts in reaching out to RRP rule stakeholders on issues such as clearance testing, contractor recertification and lead paint test kits approved for compliance.

A variety of public health programs have been successful over the last two decades in addressing childhood lead exposure including implementation of the RRP program in 2010. According to the Centers for Disease Control and Prevention (CDC), in 1997, 7.61 percent of children under the age of six were found to have an elevated blood lead level, which is defined as having 10 or more micrograms per deciliter of lead in blood. However, in 2014, the last year for which data is available from the CDC, only 0.53 percent of children under age six had an elevated blood lead level. NLBMDA is encouraged by this very low percentage of effected children and believes this new data should have significant weight in the Agency's review of the rule and reconsideration of the ill-considered removal of the opt-out provision.

Limited Data and Irregular Rulemaking Process

In July 2012, the EPA Office of Inspector General (OIG) found that EPA used limited data to develop its costs and benefits for both the 2008 rule, and the 2010 amendment removing the opt-out provision. In its report, the OIG stated that EPA had limited confidence in its economic analysis for the 2008 rule because it had not determined why the benefits analyses contained unusual results, and recommended that the Agency reexamine the costs and benefits to determine whether the rule, and the amendment, should be modified, streamlined, expanded, or repealed.

Moreover, in the initial rulemaking EPA used data from only nine firms to estimate the rule's compliance costs even though the Agency acknowledged that 323,147 firms would be affected by the rule. By only using the data from the first nine firms that provided data, EPA used a convenience sample and not a sample representative of the over 300,000 firms that would be affected by the rule.

As noted by the OIG:

"Convenience samples should not be used to develop generalizations about the target population. Random samples, when drawn properly, can be used to accurately estimate characteristics of the target population such as, in this case, what lead-safe work practices were already in use. These are basic and documented principles of survey research, as indicated by OMB and others."

The RRP rule was finalized on April 22, 2008 and was set to take effect on April 22, 2010. As announced in 2008, the rule was supposed to include an opt-out provision, which allowed the owners of homes built before 1978 to waive the rule's requirements if it was their primary residence and there was not a pregnant woman, or child under age six living there. Shortly after the rule was finalized in 2008, public interest groups challenged the rule in federal court.

On August 23, 2009, EPA entered into a consent decree with public interest groups and committed to 1) eliminating the opt-out provision, (2) applying the Housing and Urban Development (HUD) clearance test to applicable renovation activities, and (3) expanding the RRP requirements to commercial and other non-residential buildings.

When EPA completed the initial RRP rulemaking, the three requirements agreed to as part of the consent decree were considered and rejected by the Agency as offering no significant benefits and inconsistent with the Toxics Substances Control Act (TSCA). Yet, EPA committed to these new rulemakings, and did so without consulting with small businesses affected by the changes or the Small Business Administration's (SBA) Office of Advocacy, and without the

benefit of convening a Small Business Regulatory Enforcement Act (SBREFA) panel addressing the potential impact of the new requirements.

At an SBA Office of Advocacy roundtable held in Washington, D.C. on August 24, 2016, regarding the Section 610 review, a representative from EPA said there was no plan to revisit the data and assumptions used as a justification for the rule. NLBMDA is concerned by EPA's response and believes a reevaluation of the costs and assumptions is needed. When the rule was proposed and later finalized the Agency could only rely on assumptions in determining the compliance costs associated with the rule.

However, there is now over six years of data that EPA can examine to determine if the compliance costs associated with the rule are more, less, or about the same as what it originally anticipated. At this juncture it is both necessary and appropriate to look at a cross section of RRP projects to have a better understanding regarding the costs associated with the rule

Removal of the Opt- Out Provision

The final rule in 2008 contained an opt-out provision that added an element of consumer choice without compromising the safety of young children. The rule took effect on April 22, 2010, but exactly two weeks after the rule's effective date, EPA announced that it was removing the opt-out provision starting on July 6, 2010.

EPA's reversal on the opt-out provision was neither based on new information, nor was it based on any experience in implementing the opt-out provision, particularly given that EPA had barely implemented the opt-out provision when it proposed to eliminate it. The decision to remove the opt-out provision was precipitated by a Consent Decree, but there is no data that supports such a radical change to the rule.

Removing the opt-out provision more than doubled the number of homes subject to the rule from 38 million to 79 million. By EPA's own estimates, removing the opt-out provision increased annual compliance costs by \$500 million, from \$800 million to \$1.3 billion. In the view of NLBMDA, the opt-out provision was the essential element in lowering the rule's compliance costs. Removing the opt-out provision did nothing to improve safety, and took away the choice from some home owners to forgo the extra costs associated with the rule's compliance on top of the expense of renovations.

EPA's elimination of the opt-out provision also violated the Regulatory Flexibility Act, because the Agency refused to convene a Small Business Advocacy Review Panel to assess the impacts

to small businesses caused by its amendment of the rule—even though the Agency acknowledged the change would affect a substantial number of small businesses.

NLBMDA urges the Agency to reinstate the opt-out provision, if not in its original form, then modified to allow owners of homes built between 1960 and 1977 to opt-out of the rule's requirements provided that a pregnant woman or child under 72 months does not live in the home.

Test Kits Still Do Not Meet the Rule's Standard

EPA has also increased compliance costs by failing to identify a test kit that fully meets the rule's requirement of no more than 10 percent false positives. The Agency has recognized three lead-paint test kits for use in complying with the residential rule: 3M LeadCheck, D-Lead, and the State of Massachusetts. However, the State of Massachusetts test kit is not available in home improvement stores, and is only available to certified risk assessors and lead inspectors that operate in the state. Therefore, only 3M LeadCheck and D-Lead can be used by the vast majority of remodelers who perform RRP activities.

The lack of a commercially available test kit meeting the false positive standard means in some cases home owners are paying for work practices that are unnecessary and provide no benefit.

In the 2008 final rule, EPA stated with respect to lead-paint test kits that “the currently available 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.” Moreover, the Agency stated it was “confident that improved test kits meeting EPA's benchmarks will be commercially available by September 2010.”

In 2006, SBA's Office of Advocacy recommended that EPA wait to finalize the proposed second phase of this rule (i.e., 1960-1977 housing) until new paint test kits were commercially available. But EPA decided to move ahead with regulating homes built between 1960 and 1977.

EPA initially estimated that an improved test kit would reduce the rule's cost by \$400 million annually. In addition, the Agency stated in the 2008 final rule that if there were no commercially available test kit meeting the false positive standard by September 2010; it would initiate a rulemaking to extend the effective date of the final rule for one year. However, despite not approving a test kit that meets the rule's standard for false positives, EPA never initiated a rulemaking to extend the effective date of the final rule for one year.

It's worth repeating that six years after the rule took effect, and eight years after the rule was finalized, there is still no EPA-approved test kit that meets the Agency's standard for false positives. That is not only very disappointing given EPA's assurances in 2008 that a test kit meeting the standard in the rule would be available in 2010, but also a key flaw in the current rule that the Agency should feel compelled to address.

On July 31, 2013, in a letter to the National Association of Home Builders (NAHB), EPA stated that "performance verification data indicate that the false positive rate for these kits varies from 22.5% to 84% depending on the test kit used, the substrate tested (e.g., wood, metal, plaster or drywall), color of paint tested and operator experience."

Test kits continue to be too sensitive and often generate positive results even when the true lead level in paint is well below what is defined as a hazard. Accurate lead test kits were always intended to be part of the rule in an effort to limit compliance costs. Yet, there is still not an approved test kit that meets the false positive standard in the RRP rule.

At the Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting at EPA Headquarters on June 4, 2015, Eugene Pinzer, who spoke on behalf of HUD, expressed his appreciation for the RRP Rule, but also noted that the test kits currently approved by EPA are "just not there yet" and that he would like to see test kits that meet the rule's false positive standard.

At present, QuanTech, a statistical analysis and survey research firm in Rockville, Maryland, is developing a next generation lead paint test under a grant from HUD. Some stakeholders have brought up the test kit under development by QuanTech as a potential solution to the challenges with test kits currently approved by EPA. NLBMDA cautions against such thinking as it is unclear at what stage QuanTech is in the development process.

NLBMDA would welcome a new, inexpensive test kit that meets the false positive standard under the rule. But given the uncertainty surrounding the development of a next generation test kit, EPA should not assume that one will be available in the near future. If and when QuanTech is ready to bring an accurate next generation test kit to market, then EPA should meet with stakeholders.

Absent an inexpensive test kit that meets the RRP rule's standard for false positives, some have suggested using X-Ray Fluorescence (XRF) testing to determine the presence of lead-paint. Although XRF testing is accurate, it is expensive and requires radiation licensing and inspector certification. NLBMDA does not see these as viable options for the home remodeling setting.

Most certified remodelers would have to hire a certified or licensed inspector to evaluate the lead paint that would be disturbed. This adds an additional cost as part of the RRP evaluation, and could lead to additional delays as the certified remodeler must coordinate with someone certified to perform XRF testing.

Two types of hand-held machines can be used for XRF testing: one uses radioisotopes and the other uses x-ray tubes. The radioisotope device does a better job of detecting the presence of lead hidden underneath layers of paint; however, unlike the X-ray tube machine, it is radioactive all the time. The radioisotope device also requires special licensing and may pose travel issues. In addition, when a radioisotope device reaches the end of its service life or is broken or damaged, it must be disposed of as hazardous material. By comparison, X-ray tube machines are not as accurate in detecting lead paint; although they do not require special licensing, are not radioactive all the time, and do not require special handling or disposal.¹

An article titled “Rapid New Methods for Paint Collection and Lead Extraction” published in the *Journal of Environmental Monitoring* on November 4, 2008, stated that XRF analysis is “complicated, relatively expensive and will represent a significant financial investment for a small repair and renovation company.” It should be noted that this research was funded by EPA.

Moreover, in EPA’s response to comments from the 2008 RRP rule, the Agency acknowledged the significant costs to firms purchasing and maintaining an XRF machine, as well as the costs and delays to homeowners associated with using XRF analysis to determine the presence of lead paint. XRF analysis was never intended as a replacement for an accurate lead paint test kit and now is not the time to start.

NLBMDA encourages EPA to continue its efforts in identifying a test kit meeting the RRP rule’s false positive standard and avoid modifying or eliminating the positive response criterion. An accurate, commercially-available test kit has always been critical to controlling RRP compliance costs. Absent such a kit, the rule remains flawed and imposes increased uncertainty and costs.

Training for Certified Contractors

In February 2016, EPA announced revisions to refresher training requirements for certified renovators as part of the RRP program. The changes allow for online training every other recertification instead of every recertification. Renovators who take the online training are

¹ Robert Beckley and James “Scott” Groenier, *Using XRF Hand-Held Devices to Detect Lead Based Paint* (USDA, Technology & Development Program, May 2008), 3-4.

certified for three years, while renovators who take the hands-on training are certified for five years.

As part of the revised rule, once a renovator takes the refresher course without the hands-on training component, which is optional, his next refresher training must include a hands-on component. Thus, a renovator must complete hands-on recertification at least once every eight years. Previously, for RRP-certified renovators to be recertified they had to complete 6 hours of lecture—which they can do online—and two hours of hands-on training.

NLBMDA supports hands-on training for the initial certification but does not think it is necessary for recertification. Presumably if certified contractors are regularly performing RRP activities, the need to complete two hours of hands-on training every five years is unnecessary and simply increases recertification costs. Nevertheless, NLBMDA welcomes the recent change to the recertification requirement and applauds EPA for listening to the remodeling sector's concerns to make the rule less burdensome.

Conclusion

Based on the lumber and building supply industry's experience with the RRP rule, and some of the missteps that have occurred with implementation, NLBMDA strongly encourages EPA to conduct a thorough review of the program. The rule has been in effect for over six years and the data exists to conduct extensive analysis, verify compliance costs, and make improvements.

NLBMDA supports the intent of the RRP rule but believes that accurate test kits and the opt-out provision are critical provisions in making the program effective. Given the challenges with the rule, EPA should restore the opt-out provision. Moreover, EPA should continue its efforts in identifying a lead paint test kit that meets the false positive response criteria of no more than 10 percent.

Test kits currently approved by EPA for RRP compliance are ineffective in determining the presence of lead paint in homes built between 1960 and 1977. Absent a full reinstatement of the opt-out provision, NLBMDA suggests allowing home owners living in residences built between 1960 and 1977, and without a pregnant woman or child less than six years of age, to opt-out of RRP requirements.

According to EPA, only 24 percent of homes built between 1960 and 1977 contain lead paint. For residential housing built between 1960 and 1977 lead paint was only used for exterior applications on homes. Absent an accurate test kit and full reinstatement of the opt-out

provision, a limited opt-out clause is a responsible and cost-effective way to reduce the expense to the regulated community while protecting young children from lead exposure.

NLBMDA appreciates EPA's efforts on the RRP rule. The Section 610 Review should critically evaluate the success and failure of the program, and seek to reduce regulatory burdens for home owners and remodelers while protecting young children from lead exposure.

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