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February 19, 2016

James Jones, Assistant Administrator
United States Environmental Protection Agency
Office of Chemical Safety and Pollution Prevention.
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(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Lead; Renovation, Repair and Painting Program; Lead Test Kit; Notice of Opening of Comment Period (EPA–HQ–OPPT–2015–0780)

Dear Assistant Administrator Jones,

On December 21, 2015, U.S. Environmental Protection Agency (EPA) published a notice in the *Federal Register*[1] opening a second comment period to allow for further public comment in response to EPA's Fiscal Year 2015 Appropriations Act policy rider.

Specifically EPA is soliciting comment on the following potential lead test kit and field testing options raised by stakeholders during the initial comment period which opened on May 14, 2015 and included the June 4, 2015 public meeting.[2]

- Proposing to eliminate the positive response criterion;
- Proposing to modify the positive response criterion;
- Maintaining the current negative response and positive response criteria;
- Proposing to provide reduced Lead Renovation, Repair and Painting Program training requirements for X-Ray Fluorescence technicians; and
- Exploring any other lead-based paint field testing technology that would provide reduced costs for consumers, remodelers and families to comply with the RRP rule.

The National Association of Home Builders (NAHB) appreciates the opportunity to continue provide comments on this important issue. However, NAHB is concerned that most of the potential options EPA is currently requesting comment are neither new, innovative or truly provide a solution to the underlying problem. The comments included in this letter are intended to supplement and expand upon those comments already made by NAHB member and former NAHB Remodelers Chair Bob Hanbury at the June

[1] 80 *Federal Register* 79335-79336 (December 21, 2015)
[2] 80 *Federal Register* 27621-27623 (May 14, 2015)

4, 2015 public meeting and in the subsequent comment letter NAHB submitted for the record on July 6, 2015. In addition, NAHB wishes to incorporate by reference NAHB's prior comments on this matter submitted on July 6, 2015.

NAHB is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily residential construction, remodeling, multifamily ownership and management, building material trades, building products manufacturing and supply, and commercial and light industrial construction projects.

Over 95 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration, and NAHB members collectively employ over 3.4 million people nationwide. Four out of every five new homes are built by NAHB members. NAHB members are involved in the development and construction of for-sale single family homes for first-time and low- and moderate-income homebuyers, as well as the construction, ownership and management of multifamily rental housing, including affordable rental housing. NAHB's members and their activities are also subjected to numerous laws, regulations and policies issued and enforced at the federal, state and local level.

BACKGROUND & OVERVIEW

On April 22, 2008, EPA published the final rule for the Lead-Based Paint Renovation, Repair and Painting (RRP) program. The RRP rule requires contractors follow EPA prescribed lead-safe work practices during renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978, unless a determination can be made prior to the renovation or repair, that no lead-based paint would be disturbed. Under the RRP rule a certified renovator using an EPA-recognized lead test kit, could reliably determine whether or not federally regulated levels of lead-based paint is present in a given work area. Under the final RRP rule if regulated levels of lead-based paint[3] are not present, then none of the lead-safe work practices requirements, pre-renovation distribution of EPA's notification pamphlet, post work documentation by a certified renovator of the performance of lead safe work practices, and recording keeping requirements apply. The rule was amended in 2010 by EPA when, among other provisions, the opportunity to opt-out was removed from the program. The opt-out allowed homeowners to affirmatively opt-out of the requirements of the RRP program when no children under six or pregnant women were present in the target housing under renovation. Elimination of the opt-out provision affected 39,886,000 units, according to the economic analysis prepared by EPA and resulted in the RRP rule covering millions of additional pre-1978 homes that were not previously subject to the rule. The 2010 amendments made no change to the use of the lead test kit or the assumptions EPA made regarding the ability to bring to market a commercially available, reliable, affordable lead-test kit that met all of the regulatory required criteria.

To date, there are only two lead test kits recognized by EPA and available nationwide and both have only met the negative-response criterion. According to the *Federal Register* notice announcing the current comment period, "Based on stakeholder input, EPA is unaware of any lead test kit available now or in the

[3] The standard is set at content levels that equal or exceed a level of 1.0 milligram per square centimeter (mg/cm2) or 0.5 percent by weight.

foreseeable future that would meet both of the performance criteria."[4]

In acknowledgement of the current status of the test kit, Congress directed EPA ". . . to prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule. If no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives."[5]

As noted by EPA, "The use of an EPA-recognized lead test kit, when used by a trained professional, can reliably determine that regulated lead-based paint is not present by virtue of a negative result."[6] This has been the intent of the lead test kit since the original regulations for the program were finalized in 2008. As EPA so eloquently summarized in the announcement for the public meeting "Qualitatively speaking, lead test kits recognized by EPA should also serve as a quick, inexpensive, reliable, and easy to perform option for lead-based paint testing in the field."[7] This ability, to determine in the field, whether lead-based paint is present at federally regulated amounts is an essential component of a functioning RRP rule, since there is no requirement under the RRP rule to employ lead-safe work practices if lead-based paint is not present in the work area at levels regulated by EPA/the federal government.

Absent the availability of a commercially available, reliable, affordable lead-test kit certified renovators must either assume lead-based paint is present and apply lead safe work practices, or use an EPA approved test kit with the knowledge that the results are likely to be inaccurate. Ultimately, renovators and their customers are left assuming the burden of additional costs and requirements associated with the rule – all without the reassurance that these burdens address a lead-based paint hazard.

Specifically, as has been raised previously by NAHB, the lack of an EPA approved lead-based paint test kit capable of meeting both response criteria was recognized by EPA under both economic analyses prepared for the RRP rule, first in 2008 when the original regulations for the program were being finalized, and again in 2010 when EPA decided to significantly expand the number of target housing units subject to the rule by removing the "opt out" provision. In both cases, the agency recognized that a test kit satisfying both the positive and negative test criterion would not be available in the first year the rule was effective. However, EPA assumed that by year two of the program an accurate EPA approved LBP test kit would be available and on the market.

EPA had estimated that the number of RRP renovation events subject to this rule would be reduced by almost half, from 8.4 million in the first year to 4.4 million in the second year, solely because of the availability of a qualified LBP test kit.[8] EPA also projected a significant decrease in the cost of the RRP program from $758 million in the first year to $407 million in the second year.[9] Similar, though not

[4] 80 *Federal Register* 79335 (December 21, 2015)
[5] Explanatory Statement, Consolidated and Further Continuing Appropriations Act, 2015
[6] 80 *Federal Register* 79335 (December 21, 2015)
[7] 80 *Federal Register* 27623 (May 14, 2015)
[8] U.S. Environmental Protection Agency, (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*
[9] Id.

identical, language was included in both economic analyses explaining EPA's assumptions:

> Because not all buildings built before 1978 have lead-based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule. Currently available test kits for detecting whether lead-based paint is present have a high false positive rate resulting in the frequent use of lead safe work practices when they are not necessary, i.e., when lead-based paint is not present. EPA is working on the development of test kits that accurately identify both the presence and absence of lead in paint at levels that exceed the Federal standards. This analysis assumes that improved test kits will be in use starting in June 2011. Thus, the number of events with lead safe work practices is estimated to decrease from the first year to the second year because of the adoption of the improved test kits.[10]

EPA should move expeditiously to revisit the original regulation and reevaluate the economic analysis of the program as it was premised on bringing a qualified, recognized test kit to market in year two of the program. Today, almost six years later the program still struggles to come to terms with the lack of a fundamental tool promised to the regulated community to help implement the regulation despite commitments from the agency that it would take steps to address the issue in 2010 if improved test kits were not available.[11]

RESPONSE TO SPECIFIC LEAD TEST KIT AND FIELD TESTING OPTIONS PROVIDED BY STAKEHOLDERS

EPA is providing stakeholders the opportunity during the current comment period to respond to recommendations the agency received from stakeholders. NAHB urges EPA to acknowledge that existing alternatives cannot substitute for nor serve the original intended purpose of the lead test-kit. The potential lead test kit and field testing options raised by stakeholders during the earlier public comment period are not sufficient to address the regulatory deficiencies present in the RRP program resulting from the failure to bring a commercially available, reliable, affordable lead-test kit upon which the existing requirements of the RRP rule were predicated on. NAHB looks forward to the anticipated Section 610 review scheduled to begin later this year and the opportunity it presents for EPA to truly tackle the issues at hand via retrospective review of the RRP rule as a whole.

Eliminate or modify the positive response criterion.

NAHB is highly concerned that any effort to modify the test kit criterion will only mask the existing problem and in fact create an entirely new issue of uncertainty for existing EPA approved lead-based paint test kits

[10] U.S. Environmental Protection Agency, (2010). *Economic Analysis for the LRRP Opt-Out and Recordkeeping Final Rule.*

[11] As outlined in the preamble to the final RRP regulation "After reviewing the comments and weighing all of the factors, including EPA's expectation that the improved test kits will be commercially available by September 2010, EPA has decided not to include a phased implementation in this rulemaking. Therefore, this regulation will take effect at the same time for target housing and child- occupied facilities regardless of whether they were built before or after 1960. Nonetheless, if the improved test kits are not commercially available by September 2010, EPA will initiate a rulemaking to extend the effective date of this final rule for 1 year with respect to owner-occupied target housing built after 1960." at 73 *Federal Register* 21712-21713 (April 22, 2008).

in the process. The current problem is that no commercially available lead-based paint test kit has been brought to market that has been able to pass both the positive and negative response criterion established by EPA. As previously reported by EPA this is due to the exceedance of false positives tied to issues with existing test kits sensitivity to the presence of lead in paint at levels well below the regulated level.

To modify or eliminate the positive response criterion would ease EPA's ability to certify an existing lead-based paint test kit for market. However, certified renovators would not be any more certain that they are being provided a field test kit that serves the purpose which it was intended. Certifying existing lead-based paint test kits that are sensitive to lead well below regulated levels would mean any positive field test could be indicating practices are needed at a site where they are not otherwise required.

Test kits would remain an unreliable means of determining the presence of lead for the purposes of the RRP program as lead safe work practices are only required where the presence of lead in paint has been established at the regulated level of lead, set at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight, which was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[12]

The establishment of the regulated level of lead at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[13] Provisions were made to provide the Secretary of Housing and Urban Development (HUD) and the EPA Administrator with the regulatory authority to modify the regulated level of lead following a subsequent federal rulemaking process However, only HUD can modify the regulated lead level as it applies to target housing units.[14] As such, it is beyond the scope of EPA's current efforts to consider a change in the definition of lead-based paint for the purposes of the RRP program outright. Elimination or modification of the positive response criterion would result in a de facto change that similar exceeds the agency's authority.

Furthermore, certification of test kits that require lead safe work practices be applied in situations where lead-based paint is present at lower than regulated levels would blur the line between the concepts of renovation, covered under RRP, and abatement, covered under separate EPA regulations. Under 40 CFR § 745.83 the term renovation is defined for the purposes of establishing the scope of covered activities under the RRP program. The regulation states that "[r]enovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223)." Through the establishment of this distinction, EPA clearly differentiated renovation activities from abatement activities speaking to the difference in intent, practice, and outcome associated with the two different types of activities.

EPA itself, in the preamble to the 2008 regulation, stated that "EPA is not interested in teaching persons how to be painters, plumbers, or carpenters. Rather, EPA's objective is to ensure that persons who already know how to perform renovations perform their typical work in a lead-safe manner."[15] As such, requiring

[12] P.L. 102-550

[13] Id.

[14] As defined in section 302(c) of the Lead-Based Paint Poisoning Prevention Act.

[15] 73 *Federal Register* 21701 (April 22, 2008)

RRP compliance when lead-based paint is present at lower than federally regulated levels would go beyond the scope of the current Congressional directive, would alter the foundation of the program, and exceed the statutory authority provided to the agency under 402(c)(3) of the Toxic Substances Control Act (TSCA).

Modifications to XRF Training Requirements

Prior to responding to the specific proposal on X-Ray Fluorescence (XRF) testing, NAHB must remind the agency that XRF testing existed as a lead-based paint testing methodology at the time the rule was first being developed by EPA. EPA evaluated and dismissed XRF testing as both infeasible and too expensive during the development of the original regulation for compliance with the rule. Instead, as discussed above, the original regulations finalized in 2008 and the amendments to the program adopted in 2010 relied upon the development of new technology (the lead test kit) for field testing by certified renovators to comply with the regulation.

Furthermore, NAHB maintains that even should EPA modify existing requirements for operation of the XRF this testing methodology is not a one for one replacement for lead test kits. The proposal to "provide reduced Lead Renovation, Repair and Painting Program training requirements for X-Ray Fluorescence technicians" is vague and does not clearly illustrate what changes to current requirements would occur. Assuming the proposal intends to attempt to reduce the burden on certified renovators by eliminating the need to complete additional EPA training course as currently required there remain additional procurement, operation and maintenance costs for certified renovators. In addition, EPA would not be able to eliminate the ability for states to establish, as some already do, additional training requirements or inspection limitations including in states operating under the EPA run RRP program.

Initial capital costs of purchasing the unit coupled with the lifecycle maintenance costs for disposal of radioactive material will be substantial. Additionally, the time and costs associated with manufacturer training requirements will still be an additional burden above and beyond the RRP training required by EPA. Even if an individual certified renovator or certified firm chose to pursue this option these costs would likely limit the purchase to one per firm limiting their ability to simultaneously test at multiple sites. With a viable test kit such limitations would not be an issue for lead test kits as conceptualized in the development of the RRP program. Lead test kits were intended to be a field test that would be affordable and accessible for renovators at each job site without such limitations.

- Liability – for ownership, maintenance, calibration, readings, disposal. Expands concerns renovators already have with increased liability associated with taken on work in pre-1978 buildings. NAHB members have indicated that this can be a deciding factor in turning away work in certain areas.
- Additional issues regarding third party testing restrictions on the books in certain states which will not be affected

To internalize the function of XRF technician, certified renovators would be taking on a role that is outside its traditional scope of their profession thereby exceeding the intent of EPA's expectation for the program where they stated they wanted to help RRP professionals accomplish perform their typical work in a lead-safe manner. Taken cumulatively, the remaining hurdles towards adoption by certified renovators of XRF

testing reinforce the fact that XRF is not a one for one replacement for lead test kits. If EPA's intent is to provide certified renovators with an alternative option that meets the original intent of the test kit than XRF testing does not accomplish this goal.

CONCLUSION

NAHB urges EPA to avoid creating further unintended consequence for the regulated community by attempting to forcibly equate alternative test kit and field testing options that cannot substitute for nor serve the original intended purpose of an affordable, accurate, commercially available EPA approved lead test kit under the existing RRP rule. Since EPA's own analysis and rationale for the existing RRP rule was premised on the existence of such a lead-based paint test kit having already been brought to the market. In light of this glaring deficiency under the existing RRP rule NAHB urges EPA to shift its focus to a more comprehensive examination of the existing scope of the RRP rule accounting for the absence of an affordable, accurate, and commercially available lead-based paint test kit as originally envisioned by the agency and ensure that the RRP rule's requirements do not continue to be misapplied on such a widespread basis.

Thank you for your consideration. NAHB staff and its members stand ready to work with EPA during the entirety of this stakeholder outreach process and welcome any opportunity to participate in individual follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve the program, reduce unnecessary regulatory burdens and eliminate unintended consequences without undermining the effectiveness and integrity of the program or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 266-8327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,

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National Association of Home Builders

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July 6, 2015

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(Submitted electronically via website *www.regulations.gov*)

RE: Comments on Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting; Notice of Public Meeting (EPA–HQ–OPPT–2005–0049)

Dear Assistant Administrator Jones,

On May 14, 2015, U.S. Environmental Protection Agency (EPA) published a notice of public meeting in the *Federal Register* announcing a "Lead; Renovation, Repair and Painting Program; Lead Test Kit Stakeholder Meeting."[1] Acting in response to a Congressional directive EPA is seeking information related to:

> 1) The existing market for lead test kits as referenced in the 2008 Lead; Renovation, Repair and Painting Program rule;
>
> 2) The development or modification of lead test kit(s) that may meet the EPA's positive-response criterion (in addition to the negative-response criterion); and
>
> 3) Other alternatives for lead-based paint field testing.

The National Association of Home Builders (NAHB) appreciates the opportunity to provide comments on this important issue. The comments included in this letter are intended to supplement and expand upon those comments made by NAHB member and former NAHB Remodelers Chair Bob Hanbury at the June 4, 2015 public meeting.

NAHB is a Washington, D.C.-based trade association representing over 140,000 builder and associate member firms that are organized in more than 700 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. The organization's membership includes those who design, construct, and supply single-family homes; build and manage multi-family, light commercial, and industrial structures; develop land; and remodel existing homes.

Over 80 percent of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA), 55,000 NAHB members indicate they are involved in remodeling, and NAHB members collectively employ over 3.4

[1] 80 *Federal Register* 27621-27623 (May 14, 2015)

million people nationwide. Collectively, NAHB's members will construct about 80% of the new housing units projected for 2015.

Overview

On April 22, 2008, EPA published the final rule for the Lead-Based Paint Renovation, Repair and Painting (RRP) program. This regulations established requirements, effective April 22, 2010, that contractors use lead-safe work practices during renovation, repair, and painting activities that disturb lead-based paint in target housing and child-occupied facilities built before 1978 unless a determination can be made that no lead-based paint would be disturbed during the renovation or repair. Among other provisions outlined in the 2008 rule, it was established by EPA that an EPA-recognized lead test kit, when used by a certified renovator, could be used to reliably determine whether federally regulated levels of lead-based paint is present. If regulated levels of lead-based paint[2] is not present there is no requirement to employ lead-safe work practices under the RRP rule. The rule was amended in 2010 by EPA when, among other provisions, the opportunity to opt-out was removed from the program. The opt-out allowed homeowners to affirmatively opt-out of the requirements of the RRP program when no children under six or pregnant women were present in the target housing under renovation. Elimination of the opt-out provision affected 39,886,000 units, according to the economic analysis prepared by EPA and resulted in the RRP rule covering millions of additional pre-1978 homes that were not previously subject to the rule. The 2010 amendments made no change to the use of the lead test kit or the assumptions EPA made regarding the ability to bring to market a commercially available, reliable, affordable lead-test kit that met all of the regulatory required criteria.

At the time the 2008 rule was finalized no available test kit met the criteria established by EPA under the regulation. Under 40 CFR 745.88(c) for a lead test kit to be recognized by EPA it must meet separate negative-response and positive-response criteria which essentially relate to the probability of receiving false negative results and false positive results when using the test kit.

- 40 CFR 745.88(c)(1). The negative-response criterion states that for paint containing lead at or above the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a negative response less than or equal to 5% of the time must be met.

- 40 CFR 745.88(c)(1)-(2). The positive-response criterion states that for paint containing lead below the regulated level, 1.0 mg/cm2 or 0.5% by weight, a demonstrated probability (with 95% confidence) of a positive response less than or equal to 10% of the time must be met.

To date, there are only two lead test kits recognized by EPA and available nationwide and both have only met the negative-response criterion. EPA stated that this recognition will remain in effect until EPA announces recognition of the first test kit that meets both criteria established in the rule.[3] Under the regulation, all lead test kits recognized after September 1, 2010 must meet both the negative-response and positive-response criteria.

[2] The standard is set at content levels that equal or exceed a level of 1.0 milligram per square centimeter (mg/cm2) or 0.5 percent by weight.
[3] http://www2.epa.gov/lead/lead-test-kits (accessed July 1, 2015)

The lack of a test kit meeting both response criteria was reflected in the required economic analysis which was prepared when the original regulations for the program were being finalized in 2008 and again when the program was amended in 2010. In both cases, the agency recognized that a test kit satisfying both criteria would not be available in the first year the rule was effective. However, EPA assumed that in year two of the program a qualified, recognized test kit would be available and on the market. Indeed, EPA estimated that the number of RRP renovation events would be reduced by almost half, from 8.4 million in the first year to 4.4 million in the second year, solely because of the availability of a qualified test kit.[4] EPA also projected a significant decrease in the cost of the RRP program from $758 million in the first year to $407 million in the second year.[5] Similar, though not identical, language was included in both analyses explaining EPA's assumptions:

> Because not all buildings built before 1978 have lead-based paint, the number of renovation events that need to use lead safe work practices (LSWP) is a subset of the total number of events covered by the rule. Currently available test kits for detecting whether lead-based paint is present have a high false positive rate resulting in the frequent use of lead safe work practices when they are not necessary, i.e., when lead-based paint is not present. EPA is working on the development of test kits that accurately identify both the presence and absence of lead in paint at levels that exceed the Federal standards. This analysis assumes that improved test kits will be in use starting in June 2011. Thus, the number of events with lead safe work practices is estimated to decrease from the first year to the second year because of the adoption of the improved test kits.[6]

NAHB has been actively engaged in EPA's lead-based paint program for the residential sector since its inception and has maintained a commitment over time to program implementation including consistently advocating on behalf of the remodeling industry on the importance of obtaining and maintaining the required training and certification under EPA's RRP rule. In line with that commitment, NAHB has repeatedly raised concerns over the practical implications for the program resulting from the fact that a reliable pre-renovation test kit that can be used to determine if regulated levels of lead are present, as defined, on painted surfaces in pre-1978 structures has never been brought to market. In fact, EPA itself eloquently summarized the need for test kits in the announcement for the June 4th public meeting stating "lead test kits recognized by EPA should also serve as a quick, inexpensive, reliable, and easy to perform option for lead-based paint testing in the field."[7]

In June 2013, NAHB met with EPA to discuss ongoing work related to recognition of lead test kits. In a July 31, 2013 response letter to NAHB, EPA clearly stated that the agency would make no additional commitment of resources to foster the development of a test kit that would meet both the false negative and false positive criteria outlined in the RRP rule; nor would EPA provide any additional support for test kit research and development efforts by private companies. NAHB understands the fiscal constraints EPA has faced and the technical limitations that have limited

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[4] U.S. Environmental Protection Agency, (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*
[5] *Id.*
[6] U.S. Environmental Protection Agency, (2010). *Economic Analysis for the LRRP Opt-Out and Recordkeeping Final Rule.*
[7] 80 *Federal Register* 27623 (May 14, 2015)

advancements in developing a viable test kit. However, the decision by EPA to relinquish responsibility for a key component of the program on which the EPA economic analysis and subsequent program design choices were founded remains troubling.

As a result of EPA's decision, the RRP rule is increasingly applied to buildings that may otherwise have been excluded from the scope of the rule by a test kit that can accurately reflect the presence of regulated levels of lead-based paint. Without a reliable test kit, certified renovators must either assume lead-based paint is present and apply lead safe work practices, or use an EPA approved test kit with the knowledge that the results are likely to be inaccurate. Ultimately, renovators and their customers are left assuming the burden of additional costs and requirements associated with the rule – all without the reassurance that these burdens address a lead-based paint hazard.

Ensuring a structurally sound regulatory program that accurately reflects the on the ground realties faced by the remodeling industry will ultimately result in a more robust program overall. As it is currently being implemented the program is an inefficient tool for achieving the environmental and health goals of the underlying statute and regulation. The use of time, resources, and capitol on RRP renovation jobs that could otherwise have been deemed outside the rule's scope of coverage undermines the programs ability to target resources where they are most needed. The increased costs of these renovation jobs can also contribute to homeowners increasing their risk by putting off needed renovations, taking them on themselves or turning to uncertified contractors acting in violation of the rule.

As the representative from the U.S. Department of Housing and Urban Development raised during his statement at the public meeting, the lack of a test kit satisfying the RRP's requirements undermines the government's ability to meet both its responsibility to protect the health of the public and be good fiduciary stewards of the money it is entrusted to oversee. While he spoke in his role as a public servant, the same can be said for the relationship between renovators and their clients and paints a clear picture as to why the lack of a commercially available, reliable, affordable lead-test kit is such a concern for the remodeling industry.

Economic Analysis

The lead test kit status quo has concerned NAHB for many years as the economic analysis of the RRP rule conducted in 2008 for the final rule and for the 2010 amendments was predicated on the fact that a reliable, affordable field test kit would be available on the market in year two of the program. While some stakeholders will argue that the cost effectiveness of the testing option is not EPA's concern, under both the statute, existing Executive Orders, and related guidance documents EPA is required to be concerned with the cost effectiveness of the rule. First, as EPA has clearly acknowledged in the regulatory preamble to the 2008 final rule, the agency "as directed by TSCA section 2(c), considered the environmental, economic, and social impact of this rule."[8] In addition, the regulations for the RRP program have consistently been subject to interagency review under Executive Order (E.O.) 12866. Under E.O. 12866, "Regulatory Planning and Review,"[9] each agency is to identify and assess available alternatives to direct regulation and alternative forms of regulation to reduce costs and burdens. Agencies must also assess the costs and benefits of proposed regulations and only adopt those whose benefits justify their costs. Importantly, E.O. 12866 also requires agencies to base regulatory decisions "on the best

[8] 73 *Federal Register* 21701 (April 22, 2008)
[9] 58 Fed. Reg. 51,735 (Sept. 30, 1993).

reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulation."[10]

Furthermore, EPA was so confident that an improved test kit would be in use by the second year of the program that in the preamble to the final rule in 2008 the Agency committed that "if the improved test kits are not commercially available by September 2010, EPA will initiate rulemaking to extend the effective date of this final rule for 1 year with respect to owner-occupied target housing built after 1960."[11] Quite obviously that time has come and gone and EPA has failed to hold up its commitments to the regulated community. However, five years later the opportunity exists, through stakeholder engagement such as this, to examine what the real world implications of this failure have been and to look toward practical fixes to reform the program moving forward.

Existing Alternatives Can't Substitute For Lead Test-Kit

NAHB acknowledges that two additional testing methods currently exist but would remind EPA that both methods also existed at the time the rule was first being developed. The two testing options are hand held XRF testing and the submitting of paint chip samples for subsequent chemical analysis by an EPA accredited laboratory under the National Lead Laboratory Accreditation Program (NLLAP). NAHB continues to believe that neither of these two existing lead-based paint testing methods serves as substitutes for the reliable, affordable lead-based paint test kit that this rule was predicated on. Furthermore, EPA evaluated and dismissed both of these existing lead-based paint testing methods as both infeasible and too expensive during the development of the original RRP rule for compliance with the rule. While both have subsequently been approved for use in the absence of a reliable test kit the practical issues renovators face when contemplating the use of either an XRF or paint chip analysis to test for the presence of lead-based paint illustrate why they cannot serve as a direct substitute for the test kit.

Paint chip analysis is not a field test. Once collected the samples must be sent off to a certified laboratory for analysis costing the consumer money in the form of project delay and preventing the certified renovator from legally beginning work. Meanwhile, while XRF analysis can at least provide immediate results in the field there remain several practical, economic, and even regulatory barriers that will prevent XRF testing from ever serving as an equivalent tool to the quick, affordable, and reliable lead test-kit envisioned by EPA under the final RRP rule. For example, in looking specifically at XRF testing the additional costs, whether absorbed by a company directly or through contracting with an outside firm, can include meeting requirements for additional certification and training to operate the XRF testing device, capital investment in the XRF equipment, and the obvious delays resulting from a certified renovator having significantly more potential job sites requiring lead-based paint testing than available XRF devices and certified staff to operate the testing device. All of these factors contribute to the result that neither XRF nor paint chip analysis can serve as a functional equivalent of the lead test-kit as envisioned by the original rule. Finally, it would be contrary to the agency's original intent under the rule to require certified renovators to rely upon lead testing methods which they cannot perform themselves without subsequent training and certifications from both EPA and the states.

A Practitioner's Quagmire

For some renovators restrictions on the use of the test kits already exist at both the state and federal level due in part to the questionable reliability of the test kits. For others, operating in states such as Illinois, it is illegal for the RRP certified renovator to be the one testing for the

[10] *Id.* § 1(b)(7).
[11] 73 *Federal Register* 21713 (April 22, 2008)

presence of lead and they must bring in a state certified third party to do any testing. Couple all this with the broader regulatory and market constraints associated with other testing options (e.g. XRF) and most certified renovators are left with limited choices in the field.

Furthermore, homeowners subject to 1018 disclosure requirements must also grapple with the uncertainty of test kits. Despite the questionable reliability of the lead test kits homeowners must disclose any known results when they go to sell their property. While EPA and HUD have also encouraged homeowners to disclose information about the reliability of the tests the prospects of a false positive reading elevates concern for homeowners. As a result, the decision to act under the presumptive presence of lead may also be driven by the clients themselves faced with the lack of a test kit that meets both the positive and negative criteria of the regulation.

The resulting quagmire practitioners' face is that without a reliable, affordable field test kit or a cost competitive realistic alternative the most "reasonable" choice available has been to act under the presumptive presence of lead. In other words, for any home or child occupied facility built before 1978 the renovator chooses to apply the requirements of the RRP rule despite the possibility that no lead-based paint is present. As a result, certified renovators are over applying the rule increasing the number of RRP events beyond any reasonable estimates for the program and creating an unnecessary burden on their businesses and their clients. According to EPA, as illustrated in Figure 1, 24 percent of homes built between 1960 and 1977 contain lead-based paint. As a result, when renovators act under the presumptive presence of lead in dealing with this segment of housing stock that means that 76 percent of the time the rule is likely being applied in a home never intended to be covered by the RRP rule. Applying this rule in such a manner doesn't serve to provide the desired health benefits or mitigate a hazard to pregnant women or children under 6 and goes well beyond the scope and intent of the statute and the regulation. In fact the opt-out was originally included by EPA in the 2008 rule to help address this concern of over application of the rule.

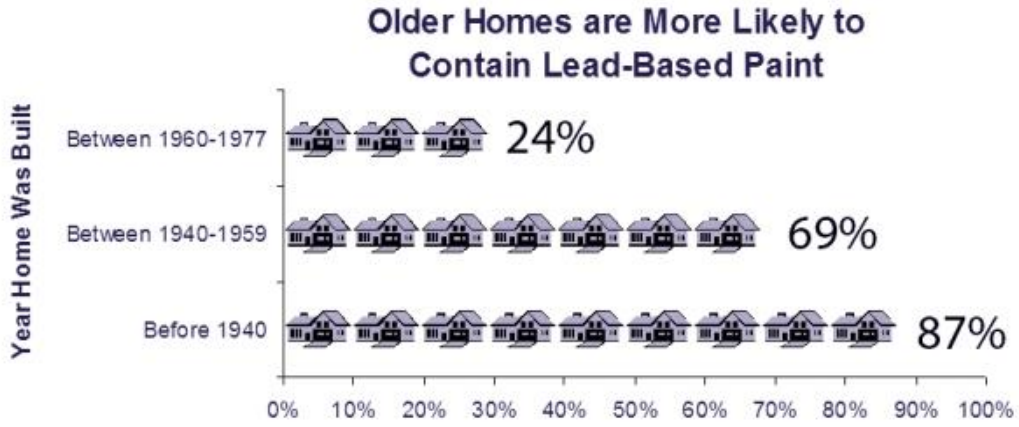

Figure 1[12]

In addition, acting under the presumption of presence not only results in an over-application of the rule increasing regulatory costs and reducing the efficiency and efficacy of the rule but it also opens up the regulated community to unnecessary liability concerns. Once a certified renovator presumes the presence of lead, then all requirements of the rule go in effect. Should EPA initiate an inspection, that inspector will likewise presume the presence of lead. Thus, despite the fact

[12] http://www2.epa.gov/lead/protect-your-family#sl-home (accessed on May 5, 2015)

that TSCA enforcement of the RRP rule is limited to actual creation of lead-based paint hazards[13], renovators may endure lengthy and invasive federal investigations and be forced to pay thousands in fines even though a lead-based paint hazard never existed.

The renovator will be subject to record keeping and work practice requirements equivalent to a work site where lead paint is known to be present and if an enforcement action is taken there will be no difference between the two sites. The potentially burdensome enforcement weight the regulated community finds itself voluntarily assuming because of a flawed regulatory structure runs counter to the intent of the test kit provisions and the design of the program as assumed in both the 2008 and 2010 economic analyses.

June 4, 2015 Stakeholder Meeting

NAHB is encouraged by the initiation of the stakeholder dialogue called for by Congress in the report language accompanying the FY 2015 Consolidated and Further Continuing Appropriations Act:

> The Agency is directed to prioritize efforts with stakeholders in fiscal year 2015 to identify solutions that would allow for a test kit to meet the criteria within the 2008 rule to reduce costs for consumers, remodelers and families to comply with the rule. If no solution is reached by the end of the fiscal year, EPA should revisit the test kit criteria in the 2008 rule and solicit public comment on alternatives.[14]

In addition, NAHB appreciates the ongoing nature of this dialogue and the opportunity to offer additional thoughts on issues raised at the June 4th meeting. While all federal lead based paint programs are ultimately moving to the same end – mitigating the hazards presented by exposure to lead based paint – they are by design very different programs. These programs are carried out by different agencies, under varying regulatory constraints and targeting different segments of the regulated community.

Regulated Level of Lead

The establishment of the regulated level of lead at 1.0 milligrams per square centimeter or equal to or in excess of 0.5% by weight was done through statute when Congress adopted the Residential Lead-based Paint Hazard Reduction Act of 1992.[15] Provisions were made to provide the Secretary of Housing and Urban Development (HUD) and the EPA Administrator with the ability to modify that level through regulation. However, only HUD can modify the regulated lead level as it applies to target housing units. As such, it is beyond the scope of EPA's current efforts to consider a change in the definition of lead-based paint for the purposes of the RRP program.

Despite this regulatory authority, HUD has taken a different approach and focused on funding research into test kits that would meet both the false positive and false negative criteria using the established regulated level of lead. Testimony was provided during the public meeting on June 4, 2015 from a HUD-funded company working to adapt existing test kits to address the issues that arise due to their sensitivity to the presence of lead in paint at levels well below the regulated level. NAHB commends HUD for its continued commitment to research despite the 2013 decision by EPA to end its research on lead test kits.

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[13] 15 U.S. Code § 2682(c)(3)
[14] Joint Explanatory Statement in the Congressional Record for P.L. No: 113-235
[15] P.L. 102-550

Renovation is not Abatement

Furthermore, at the June 4th meeting the discussion of the regulated level of lead was extended to also include the concept that EPA should examine whether RRP requirements be applied in situations where lead-based paint is present at lower than regulated levels. To do so would blur the line between the concepts of renovation, covered under RRP, and abatement, covered under separate EPA regulations. Under 40 CFR § 745.83 the term renovation is defined for the purposes of establishing the scope of covered activities under the RRP program. The regulation states that "[r]enovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces, unless that activity is performed as part of an abatement as defined by this part (40 CFR 745.223)." Through the establishment of this distinction, EPA clearly differentiated renovation activities from abatement activities speaking to the difference in intent, practice, and outcome associated with the two different types of activities. This distinction is critical given the presumption by some stakeholders that an examination of the test kit issue can and should result in a reexamination of the very foundation of this program.

EPA itself, in the preamble to the 2008 regulation, stated that "EPA is not interested in teaching persons how to be painters, plumbers, or carpenters. Rather, EPA's objective is to ensure that persons who already know how to perform renovations perform their typical work in a lead-safe manner."[16] As such, requiring RRP compliance when lead-based paint is present at lower than regulated levels would go beyond the scope of the current Congressional directive, would alter the foundation of the program, and exceed the statutory authority provided to the agency under 402(c)(3) of the Toxic Substances Control Act (TSCA).

While these are only two examples of items raised during the meeting NAHB would urge EPA to be extremely cautious in expanding the scope of the current undertaking. NAHB's recommendations have been narrowly tied to the absence of the test kit, a component of the regulation, and the potential remedies that may be a means of achieving the goals it was originally aimed at providing. While the inclusion of a yet to be developed technology in regulation can drive technological innovation that clearly has not occurred to date with regards to the RRP lead test kits. EPA should not sit back and ignore the reality of program implementation and the unintended consequences of what happens when practitioners must act absent that necessary technological innovation.

Next Steps

While NAHB applauds HUD for continuing research on test kits, and is pleased to see EPA seek stakeholder input, it is clear that a test kit meeting the Rule's requirements will not be available for the foreseeable future. In order to provide all parties with an adequate understanding of the RRP Rule's true costs and benefits, NAHB urges EPA to revisit and revise the economic analysis developed for the program. The Agency's original economic analysis for the RRP rule was predicated on a faulty assumption that presumed a commercially available, reliable, and affordable lead-based test kit that met the regulatory criteria would be available in year two of the program. In fact EPA estimated that once reliable test kits were available in the second year of the rule's implementation, the number of work sites covered by the rule would be cut in half.[17]

[16] 73 *Federal Register* 21701 (April 22, 2008)
[17] U.S. Environmental Protection Agency. (2008). *Economic Analysis for the TSCA Lead Renovation, Repair, and Painting Program Final Rule for Target Housing and Child-Occupied Facilities.*

In reality, the lack of reliable test kits which meet both the positive and negative criteria as outlined in the 2008 RRP regulation calls into question EPA's original economic analysis upon which the requirements for the rule were based. Furthermore, the fact that the economic analysis for both the original 2008 regulation and the 2010 amendment were both predicated on this assumption undermines the validity of the data presented to the Office of Management and Budget during review of the rules under E.O. 12866. As such, it calls into question whether the program as it currently exists would have been adopted if the economic analysis would have been based on existing technology and not the development of an elusive test kit yet to be developed.

NAHB urges EPA to initiate as expeditiously as possible a review and revision of the economic analysis. A new economic analysis of the Residential RRP regulation should be conducted separate from actions EPA is undertaking in relation to other rulemaking proceedings and should take into account the underlying environmental, health and economic impacts of the RRP program. NAHB urges EPA to consider the adoption of measures that limit the scope of coverage and ensure that the estimated number of RRP events is more reflective of the goals and intents of the program. For example, EPA could limit the scope of housing stock covered by the regulation to homes built before 1960 which have a greater likelihood of containing lead-based paint. Furthermore, EPA could revisit the issue of an opt-out or other regulatory alternatives to ensure that the rule is effectively targeting the at risk population identified in the regulatory hazard finding avoiding application of the RRP program where lead-based paint hazards are not present.

The program as it is currently being implemented cannot efficiently target the underlying environmental and health goals it was established to meet. To address this deficiency EPA should act to narrow the targeted scope of the rule to cover those homes most likely to contain lead-based paint and those most likely to present an exposure risk to children under 6 or pregnant women. By effectively retargeting this program through an accurate economic analysis and a realistic evaluation of available tools and resources EPA will ensure that the RRP program moving forward works better for not only the certified renovators operating within the program but also for the clients and communities they serve.

Thank you for your consideration. NAHB staff and its members stand ready to work with EPA during the entirety of this stakeholder outreach process and welcome any opportunity to participate in individual follow-up meetings. As with any regulation, meaningful retrospective review of the program following implementation is key to identifying opportunities to improve the program, reduce unnecessary regulatory burdens and eliminate unintended consequences without undermining the effectiveness and integrity of the program or impeding the underlying environmental objective of the authorizing statute.

Please do not hesitate to contact me at (202) 266-8327 or tspielvogel@nahb.org if you have any questions or if you would like to discuss NAHB's comments further.

Sincerely,

Tamra Spielvogel
Environmental Policy Program Manager
National Association of Home Builders