August 26, 2016

Environmental Protection Agency
EPA Docket Center, Mail Code 28221T
1200 Pennsylvania Ave NW
Washington, DC 20460

Re: Docket EPA-HQ-OPPT-2016-0126
Section 610 Review of the 2008 Lead Renovation, Repair, and Painting Program (RRP)

To Whom It May Concern:

This is an updated version of our August 25 comment to change the number of certified renovators from 134,000 to 304,000 on page 5 to reflect the updated EPA presentation from its Small Business Administration briefing.

The Environmental Defense Fund (EDF) is pleased to present these comments to the United States Environmental Protection Agency (EPA) as it reviews the Lead Renovation, Repair, and Painting Program (RRP) in accordance with Section 610 of the Regulatory Flexibility Act. EDF believes that the RRP is an essential component to the nation's commitment to preventing lead exposure amongst our children and that the facts support the continued need for the rule. In these comments, we will highlight the continued need for the rule and the need for it to continue to apply to all target housing, discuss how EPA can better enforce the rule to create a level playing field for regulated small businesses, and address concerns regarding the test-kits.

About the Environmental Defense Fund

EDF's mission is to preserve the natural systems on which all life depends. We have more than 1.5 million members and a staff of 500 scientists, economists, policy experts, and other professionals around the world. Guided by science and economics, we find practical and lasting solutions to the most serious environmental problems. This has drawn us to areas that span the biosphere: climate, oceans, ecosystems and health. Since these topics are intertwined, our solutions take a multidisciplinary approach. We work in concert with other organizations — as well as with business, government and communities — and avoid duplicating work already being done effectively by others.

Continued Need for the Rule

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In recognition of the hazards to children's health posed by lead-based paint, in 1992, Congress added section 402(c) to the Toxic Substances Control Act requiring EPA to regulate contractors conducting, "…renovation or remodeling activities in target housing… that create lead-based paint hazards."[1] In working towards the 2008 final rule, and as required by statute, EPA thoroughly evaluated the extent to which renovation and repair activities create lead-based paint hazards and especially lead dust hazards. In addition to literature review, EPA conducted peer-reviewed studies and solicited extensive comment from public health experts, industry, labor, and small businesses.

The result of this work, well summarized in the EPA's notice of the final rule,[2] conclusively demonstrated that typical renovation and repair activities create leaded dust in excess of EPA's hazard levels. Since the final rule was promulgated, there have been, to our knowledge, no additional studies published that would refute EPA's findings from 2008.

Indeed, in recent years, the scientific evidence of the dangers to children of lead exposure has only grown more compelling at lower levels of lead. When the final rule was promulgated, the U.S. Centers for Disease Control and Prevention (CDC) recognized a "level of concern" of 10 micrograms of lead per deciliter of blood (µg/dL) for children six and younger. In response to the growing body of evidence for harm at lower levels, in 2012, CDC replaced the level of concern with a "reference level" of 5 µg/dL to be used "…to identify children who have been exposed to lead and who require case management," while noting that, "[n]o safe blood lead level in children has been identified."[3]

This change greatly increased the number of children identified as in need of services as a result of their lead exposure. Based on the National Health and Nutrition Examination Survey (NHANES) covering 2007-2010, an estimated 164,600 children 1-5 years old (0.8%) met or exceeded the previous level of concern of 10 µg/dL. Using the lower reference value of 5 µg/dL, 535,000 children (2.6%) are now included.[4] CDC's reference level, based on population surveys of exposure, is to be adjusted every four years, and all indications are that the reference level will be lowered further later this year. CDC further called for, "…shifting our focus to primary prevention of lead exposure… reduc[ing] or eliminat[ing] dangerous lead sources in children's environments BEFORE they are exposed."[5] By regulating renovation and repair without regard to the presence of children or their blood lead levels and preventing the accumulation of leaded dust and other lead-based paint hazards, the RRP rule helps answer this call.

At least one study published since 2008 and EPA's own enforcement actions continue to demonstrate that, absent regulation and enforcement, many renovators and remodelers continue to create preventable lead-based paint hazards in the course of their work. In summarizing its FY15 RRP enforcement actions covering 75 cases, EPA noted that, "[m]ore than half of the

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[1] 15 U.S.C. 2682(c)(3).
[2] 73 FedReg 21691.
[3] Centers for Disease Control and Prevention. "What Do Parents Need to Know to Protect Their Children: Update on Blood Lead Levels in Children." http://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm Accessed 8/20/2016
[4] Centers for Disease Control and Prevention. (2013, April 5). Blood Lead Levels in Children Aged 1–5 Years — United States, 1999–2010. MMWR. Morbidity and Mortality Weekly Reports. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6213a3.htm Accessed 8/21/16.
[5] Centers for Disease Control and Prevention. "What Do Parents Need to Know to Protect Their Children: Update on Blood Lead Levels in Children." http://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm Accessed 8/20/2016 Emphasis in original.

cases cited violations of work practice standards and other requirements that directly affect how work is performed."[6] In other words, violations identified are not merely "paperwork" concerns, but in over half the cases represent the failure by regulated entities to take the actions necessary to prevent the creation of lead hazards. To show such violations, in most cases, an investigator would most likely have to catch the contractor "in the act" while working, making this potentially a vast underrepresentation of the actual extent of work practice violations. A 2009 analysis of New York State lead inspections published by CDC found that up to 40% of environmental investigations for children with elevated blood levels identified a home renovation, repair, or painting activity as a possible contributing factor.[7] Recently, media reports have highlighted experts attributing the rise in blood lead levels in some Michigan communities to increased renovation activity.[8]

Given the legislative directive to regulate renovation and repair activities that create lead hazards, the unrefuted proof that common renovation and repair activities create lead hazards, the demonstrated failure of regulated entities to prevent the generation of lead hazards absent regulation and enforcement, and the growing evidence that more children are impacted by lead hazards than previously thought, there is clear continued need for the RRP rule.

All Target Housing Must Remain Included

In the 2008 final rule, EPA allowed homeowners without children six years old or younger to "opt-out" of the requirements of the rule. This provision was contrary to the statutory language calling for EPA to regulate renovation activities in all target housing,[9] put pregnant women and children moving into or visiting recently renovated housing at risk of lead exposure, risked substantial lead exposure for children at neighboring homes especially from exterior work, made the rule more complicated for businesses and consumers to understand, risked exposure with negative health potential to older children and adults, and created opportunities for contractors to pressure homeowners into accepting substandard protections. Health and environmental advocates subsequently sued EPA, and EPA agreed to consider removing the "opt-out" provision. In 2010, after notice and comment, EPA agreed that the "opt-out" was misguided and removed it from the rule.

In the preamble to the revision removing the "opt-out," EPA laid out quite thoroughly the rationale for doing so.[10] In particular, EPA noted, "[t]he Agency believes that it should only allow provisions such as the opt-out for situations where the information available to EPA indicates that the RRP rule work practices are not necessary to minimize exposure of occupants

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[6] U.S. Environmental Protection Agency. "EPA Settlements Help Protect Public Against Health Hazards from Lead Exposure." https://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/0d3d2dbe30561bad85257eeb00698fc7!OpenDocument Accessed 8/20/16.

[7] Amongst children with BLLs <20 µg/dL who received inspections, 40% had a renovation factor. Amongst more severely exposed children, the percentage with a renovation risk factor was lower. Centers for Disease Control and Prevention. (2009, January 30). Children with Elevated Blood Lead Levels Related to Home Renovation, Repair, and Painting Activities --- New York State, 2006—2007. MMWR. Morbidity and Mortality Weekly Reports. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5803a3.htm. Accessed 8/20/16.

[8] Harger, Jim. "Lead poisoning up in kids: Surge in remodeling, rental demand blamed for spike." MLive.com 19 August 2016. http://www.mlive.com/business/west-michigan/index.ssf/2016/08/lead_poisoning_up_for_kids_--.html Accessed 8/24/16.

[9] 15 U.S.C. 2682(c)(3).

[10] 87 FedReg 24803-7

to lead paint hazards."[11] EDF believes that all the rationales outlined by the EPA for eliminating the provision are still valid, and all evidence, as discussed in the section above, continues to support that the work practices are still necessary to minimize exposure to lead. Indeed, the increased findings of harm at lower levels of lead, as discussed in the previous section, only further support the need for the work practice standards to eliminate exposures. Even setting aside the plain statutory requirements, by EPA's own statements and logic, there is no basis to re-examine an "opt-out" provision.

Leveling the Playing Field

EDF believes that one of the greatest challenges facing the well intentioned and compliant renovator is non-compliant competitors. While the cost of complying with RRP requirements are modest and well below the value of the benefits, there are additional costs that compliant firms need to either pass on to clients or absorb and reduce their own margins. Competitors who disregard the requirements and face no penalties for doing so may be able to undercut compliant firms on price. This concern was specifically noted in EPA's economic analysis of the rule, which highlighted the importance not only of enforcement, but also of consumer education to help create recognition of the value in lead safe work practices and compliance.[12] To avoid penalizing those firms who have complied with the rule to date, it is critical that the EPA enforce the rule against those who are willfully or ignorantly ignoring its requirements, while also doing more to increase public awareness of the importance of its requirements.

Unfortunately, the evidence suggests that EPA's enforcement efforts have been minimal compared to the scope of the rule and the size of the regulated community. In its economic analysis, EPA estimated that 11.4 million projects a year would potentially fall under the scope of the rule, with 4.4 million of those utilizing the work practices required by the rule.[13] However, EPA conducted only 736 investigations into RRP compliance in FY15,[14] putting the odds of being subject to investigation on the order of one in 15,000 projects. With such levels of enforcement, even a busy renovator would be unlikely to ever encounter an EPA investigator over the course of his or her career.[15] While this calculation excludes actions taken by the 14 states with delegated authority, even doubling the rate would still leave most renovators never encountering an investigator over decades of work.

Based on EPA's economic analysis of the rule, approximately 23% of the annualized costs of the rule are for training and certification.[16] While this represents a barrier for renovators to become compliant, it also means that once they are certified, much of the costs are already sunk. Ensuring that renovators are at least complying with the training and certification requirements therefore represents a realistic strategy for generating compliance with the overall rule requirements while also helping to level the playing field for compliant small businesses.

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[11] 87 FedReg 24806
[12] U.S. Environmental Protection Agency. §402(c) LRRP Economic Analysis. 2008. P.3-39 – 41.
[13] *Ibid.* Table ES-3.
[14] EPA staff presentation on August 24, 2016 to the SBA Environmental Roundtable Meeting on "Section 610 Review of Lead-Based Paint Activities; Training and Certification for Renovation and Remodeling Requirements."
[15] Assuming five projects a week for a year is 260 annual projects. At that pace, with 1 in 15,000 odds, one would expect an investigation once every 57 years.
[16] U.S. Environmental Protection Agency. §402(c) LRRP Economic Analysis. 2008. P.4-149.

However, EPA has fallen short at reaching the regulated community. The agency estimated that 212,000 firms would need certification and 236,000 renovators need training in the first year, with 42,000 firms and 47,000 renovators in subsequent years.[17] Currently, EPA has only reached about half of the first year estimate, with only approximately 91,000 certified firms and 304,000 certified renovators between EPA and state programs.[18]

EPA has taken some creative approaches to addressing this challenge, including offering support for changes to the model building codes published by the International Code Council that would require local permitting officials to ask for proof of lead-safe firm certification when issuing permits for renovations in target housing. Integrating RRP requirements into existing systems for the regulation of construction will greatly help to increase incentives for compliance and we encourage EPA to continue such pursuits.

Finally, we note that EPA's reliance on the "cleaning verification" process to determine successful completion of regulated work makes meaningful enforcement more difficult, and therefore serves to encourage non-compliance and further tilt the scales towards less conscientious contractors. A quantitative clearance test would have provided a clear incentive for contractors to carefully follow work practice standards to avoid the cost of re-cleaning and retesting, and would have provided an easy "paper trail" for investigators to assess. The clearance results would also provide assurance to the home or building owner that the project was done correctly and the resulting conditions are safe, potentially adding value to the project. Instead, EPA's reliance on a self-administered visual assessment provides very minimal incentive to follow the work practices, no value to the homeowner, and forces inspectors to be present while work is occurring to actually assess proper adherence to the rule's protocols. EPA should again consider quantitative clearance as a strategy to help ensure that all regulated entities are following the requirements and avoid undercutting those who take their obligations to protect children's health seriously.

Concerns on Test-kit False Positives Not Relevant

EPA "exercised its discretion" to solicit comments on lead-test kits in this 610 review.[19] Indeed, trade associations representing some in the renovation and remodeling community have vocally raised concerns that the RRP rule is being applied unnecessarily to projects because the currently available test-kits have a high rate of "false positives." That is, test-kits frequently indicate the presence of lead when the level of lead in the paint is below the current regulatory definition of lead-based paint. This means that renovators utilize the lead-safe work practices required by the rule even when they may not have had to if a more accurate test of the paint had been conducted. EDF believes that these concerns, however, are largely irrelevant given the changing definition of lead-based paint and EPA's responsibility to prevent the creation lead-based paint hazards.

The regulatory definition of lead-based paint is set as 5000 parts per million (ppm) or 1.0 milligram per square centimeter (mg/cm^2). These definitions were included by Congress in the Residential Lead-Based Paint Hazard Reduction Act of 1992, with authority granted to EPA and the Department of Housing and Urban Development (HUD) to set other levels. Although the

[17] *Ibid*. Table ES-4.
[18] EPA staff presentation on August 24, 2016 to the SBA Environmental Roundtable Meeting on "Section 610 Review of Lead-Based Paint Activities; Training and Certification for Renovation and Remodeling Requirements."
[19] 81 FedReg 52394.

level of lead in new paint was restricted to 600 ppm since 1978, the higher level was chosen for the Act, in part, to accommodate analysis by XRF with the technology available at the time. There were no health-based studies or analyses to support the levels of 5000 PPM or 1.0 mg/cm^2.

On August 10, 2009, the National Center for Healthy Housing, the Sierra Club, and others submitted a citizens' petition to EPA requesting the revision of the regulatory definitions of lead-based paint dust hazards as well as the regulatory definition of lead-based paint. The petition specifically requested changing the lead-based paint definition to 600 ppm to match the legal standard for new paint since 1978 and a corresponding change in the mg/cm^2 value. EPA granted the petition on October 22, 2009 and opened a proceeding that remains open.[20] The test-kit accuracy will need to be reevaluated against any new definition once it is determined.

There is also no doubt that certain renovation activities performed on paint with lead concentrations less than 5000 ppm or 1.0 mg/cm^2 can create leaded dust hazards in excess of current standards. EPA's Dust Study conducted in advance of the rule found, "[t]he geometric mean post-work dust lead levels on work room floors ranged from a low of 422 µg/ft^2, or 10 times the dust-lead hazard standard for floors, for cut-outs, to a high of 32,644 µg/ft^2 for power planing."[21] The interior paint in the homes used for the study averaged 4% lead by weight (40,000 ppm).[22] Thus, even if the paint average had been ten times lower, at 4,000 ppm, below the current regulatory definition of lead based paint, the proportionate reduction in mean leaded dust loading would still not have been enough to prevent the presence of a dust hazard following the work in all cases. The numbers from the RRP prohibited practices are even more extreme. Using the dust study's high number for power planing, for example, even paint at 600 ppm would proportionately result in a floor loading of nearly 500 µg/ft^2.

In addition to the requirements of EPA, renovators are subject to OSHA's Lead in Construction Rule.[23] OSHA's rule does not have a mechanism to exempt paint below EPA's regulatory definition of lead-based paint. A "false positive" demonstrating the presence of lead below the regulatory threshold would still trigger the use of lead-safe work practices that increase the likelihood that the renovator will avoid creating airborne dust in excess of OSHA limits.

Finally, it should be noted that the test kits were provided as a low-cost and easy alternative to traditional testing as a way to help potentially lower the cost to the regulated community. It is not a mandatory or even recommended component of the rule. With the concerns about false positives well documented by the EPA and trade associations, renovators are free to choose if they feel the test kits are worthwhile or not. Many renovators may find that for consistency in what they ask of their crew, it is easier to just assume lead is present and always adhere to the requirements. EPA has also provided renovators with the option to submit paint samples to certified laboratories for analysis. Although some trade associations have dismissed this as disruptive to project scheduling, we believe that this option has been underutilized. Certified laboratories with multiple locations nationally offer turnaround times of as little as three hours,

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[20] Both the petition and EPA's response granting it are available on the EPA's website at https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-section-21-petition-requesting-epa-lower-lead-dust Accessed 8/21/16.

[21] 73 FedReg 21698.

[22] Environmental Protection Agency. "Revised Final Report On Characterization Of Dust Lead Levels After Renovation, Repair, And Painting Activities." 2007. P. 6-5.

[23] 29 CFR 1926.62

as do many independent local labs. With overnight package services, this means lab results are available the next business day in almost all parts of this country.

Given that the regulatory definition of lead-based paint is currently under review and in all likelihood will be lowered, that common work practices still generate lead-based paint dust hazards at levels below the current regulatory threshold, that OSHA regulations would still apply regardless, and that renovators have other options, the concern surrounding “false-positives” from test-kits are, at best, a distraction from more pressing issues and are certainly not justification for creating additional exemptions. We would encourage EPA to maintain the status quo on test kits until such time that the regulatory definition of lead-based paint is updated.

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In summary, EDF believes that the current rule is essential to the protection of children from lead-based paint hazards created by common renovation and repair activities and that EPA can help level the playing field for compliant renovators by continuing to work to improve enforcement of the rule. We appreciate the opportunity to comment, and if you require any additional information, I can be reached at 202-572-3263 or tneltner@edf.org.

Sincerely,

Tom Neltner
Chemicals Policy Director