April 6, 2010

Delivered by electronic mail: Mabel_E._Echols@omb.eop.gov

David Rotsker
Office of Information and Regulatory Affairs
Office of Management and Budget

REQUEST FOR MEETING RE PENDING LEAD: RENOVATION, REPAIR AND PAINTING RULE (LRRP)

Dear Mr. Rotsker:

The National Lumber and Building Material Dealers Association (NLBMDA) requests a meeting with you to discuss the pending implementation of the Environmental Protection Agency’s (EPA) “Lead: Renovation, Repair and Painting Rule” (LRRP).¹

It is our desire to discuss with your office certain impediments to the practical implementation of the LRRP and the consequences of its April 22 implementation on the efforts made by this Administration and Congress to stimulate the housing sector through energy-efficient renovations.

1. As manufacturers, distributors, retailers and installers of new construction materials, our members support efforts to ensure that home renovations in pre-1978 homes are conducted in accordance with EPA’s LRRP requirements; however, we do not believe the LRRP can be practically implemented as scheduled on April 22.

   a. There are not enough accredited trainers or certified renovators to support the requirements of the LRRP.

      Currently, EPA has estimated that it has accredited 135 trainers and certified 100,000 renovators nationwide (up significantly over estimates of just a few weeks ago²), although its own compliance-needs estimates indicate that it needs at least 200,000 or more certified renovators.³ We believe the projections of EPA are overly optimistic and that the numbers will not be sufficient to support the millions of renovations carried out annually, even without a substantial retrofit incentive program like HOME STAR. We are further concerned that many areas
of the country will be significantly impacted by an inadequate number of certified renovators.

b. Approved test kits are inaccurate and unavailable.

Of currently available test kits, false positives average 47\% to 78\%.\(^4\) Accurate test kits are not expected until September 2010 at earliest, with other estimates extending availability into mid 2011.\(^5\) These test kits do not meet the level of performance needed to effectively implement the LRRP.

2. Removal of the “opt-out” provision will exacerbate these implementation problems.

EPA is proposing to remove the “opt-out” provision that is intended to address pre-1978 homes with no children 6 & under or pregnant women occupants. We expect this action will expand the number of covered homes by 40 million, making the shortage of certified renovators\(^6\) and test kits\(^7\) significantly worse.

3. The proposal by EPA to remove the “opt-out” provision has been made without adequate justifications and is contrary to EPA’s final rule justifications.\(^8\)

EPA carefully considered the “opt-out” provision during the development of its final rule, citing, among other authorities, Congressional intent and scientifically-based findings of the means of lead poisoning. EPA further modified the original lead proposal to include coverage of homes with pregnant women and clarifying the exemption was an “opt-out” option for owner-occupants of pre-1978 homes.\(^9\)

4. If implemented on April 22, the LRRP will negatively affect economic stimulus funding designated for housing weatherization and planned efforts for a national residential retrofit program.\(^10\)

With the April 22, 2010 deadline nearing, it is clear that EPA cannot ensure enough certified renovators will be available for compliance with the LRRP. Meanwhile, we can expect a significant influx of new contractors and renovators generated by the HOME STAR proposal in the same industry (i.e., residential retrofitting). This will create a conflict between LRRP enforcement and compliance and the increase in the number of retrofit contractors under a HOME STAR program. We believe the LRRP will impede the benefits desired from the renovation incentives and HOME STAR, if passed as proposed – which are deliberately intended to significantly increase renovation work in older homes.
Given the uncertainty that already exists regarding the LRRP, we believe the proposed amendment to eliminate the “opt-out” provision requires your immediate attention. We also believe the unfortunate and originally unanticipated shortfall of certified renovators and the associated unavailability of reliable test kits suggests a re-evaluation of EPA’s original assumptions and justifications for establishing the April 22 implementation date. Finally, we believe the timing of the April 22 implementation creates conflict with other pending national priorities.11

We look forward to discussing our concerns in more detail with you. Please respond at your convenience by phone (202-367-1254) or email (frank@dealer.org).

Sincerely,

Frank Moore
Regulatory Counsel

1. Starting on April 22, 2010, renovation work that disturbs more than six square feet on the interior of a home built before 1978 must follow new Lead Safe Work Practices (LSWP) supervised by an EPA certified renovator and performed by an EPA certified renovation firm, as outlined in 40 CFR § 745.85.

2. No longer posted on the EPA website: “As of March 31, 2010, more than 4,400 courses have been offered and an estimated 75,000 renovators have been trained.”

3. Go to http://www.epa.gov/lead/pubs/renovation.htm where EPA announces: “As of April 5, 2010, training providers have reported that there have been more than 4,900 training courses offered, and EPA estimates that more than 100,000 renovators have been trained. EPA projects that by the April 22 deadline, an additional 1,000 courses will be completed and an additional 25,000 renovators will be trained, bringing the number of trained renovators to more than 125,000 by that time.

In addition, EPA continues to evaluate training provider applications and this number will continue to grow. In particular, EPA has been working with the Laborers’ International Union of North America (LiUNA) to accredit their local affiliates as RRP training providers. LiUNA has estimated that they can easily train more than 50,000 additional renovators. EPA’s estimate of more than 200,000 renovators that will conduct renovation jobs in pre-1978 housing and in child-care facilities and schools is based on the total number of renovation jobs that EPA projected would occur between April 22, 2010, and April 22, 2011. EPA expects that even greater numbers of renovators will seek and obtain training once the rule has been implemented.” Contrast with projections cited in Endnote 6.
4. See 73 FR 21692 (Notice of Final Rule) at 21712, where EPA explains: “The NIST research on existing test kits shows that existing test kits cannot reliably determine that lead is present in paint only above the statutory levels because the kits are sensitive to lead at levels below the Federal standards that define lead-based paint, and therefore are prone to a large number of false positive results (i.e., a positive result when regulated lead-based paint is, in fact, not present). The NIST research found that such false positive rates range from 42% to 78%. This means 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.”. See also 71 FR 1588 (Notice of Proposed Rule) at 1599, where EPA establishes a goal and basis for widely available kits with false positive rates of less than 10% (emphasis added in bold): “These false positive rates mean that the currently-available test 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. EPA believes that the sensitivity of test kits could be adjusted for paint testing so that the results from the kits reliably correspond to one of the two Federal standards for lead-based paint, 1.0 mg/cm2 and 0.5% by weight. EPA also believes that this can be accomplished in the near future and is planning to conduct research to further the development of test kits that accurately identify both the presence and absence of lead in paint at levels that exceed the Federal standards. EPA’s goals for this research are to develop a kit that can reliably be used by a person with minimal training, is inexpensive (under $2 per test), provides results within an hour, and is demonstrated to have a false positive rate of no more than 10% and a false negative rate at 1.0 mg/cm2 or 0.5% by weight of less than 5%. This research effort is consistent with one of the stated purposes of Title X, “to mobilize national resources expeditiously, through a partnership among all levels of government and the private sector, to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards.”

5. See 73 FR 21692 (Notice of Final Rule) at 21712, where EPA explains: “As stated in the preamble to the 2006 Proposal, EPA’s goal is to foster the development of a kit that can reliably be used by a person with minimal training, is inexpensive, provides results within an hour, and is demonstrated to have a false positive rate of no more than 10% and a false negative rate at 1.0 mg/cm2 or 0.5% by weight of less than 5%. EPA is confident that improved test kits meeting EPA’s benchmarks will be commercially available by September 2010.”

6. See 74 FR 55506 (Notice of Proposed Amendment) at 55510, where EPA projects: “As of October 9, 2009: 1) 169 trainers have applied for accreditation; 2) 74 have been accredited, most will offer
training in multiple locations; 3) The vast majority of the applicants should be approved by the end of the year. Assuming an average of 85 trainers teaching in 2009 and 165 in 2010, if each gives 3 classes per week beginning in October with 25 participants, over 370,000 renovators would be trained by July 1, 2010.”

7. See 74 FR 55506 (Notice of Proposed Amendment) at 55516, where EPA projects: “The removal of the opt-out provision will affect approximately 7.2 million renovation events per year in the 40 million housing units previously eligible to use the opt-out provision. In the first year, there will be an estimated 5.4 million renovation, repair, and painting events in these housing units where the rule will cause lead-safe work practices to be used. (In the remaining 1.8 million renovation events, test kits for determining whether a surface contains lead-based paint will indicate that lead-based paint is not present.) EPA expects test kits that more accurately determine whether a painted surface qualifies as lead-based paint will become available in late 2010. Once the improved test kits are available, the number of renovation, repair, and painting events using lead-safe work practices due to the rule in housing previously eligible for the opt-out provision is expected to drop to 3.0 million events per year.”

8. See 74 FR 55506 (Notice of Proposed Amendment) at 55516, 55517, where EPA offers a cost estimate based in part on the speculative availability of test kits: “The proposed rule is estimated to cost approximately $500 million in the first year. The cost is estimated to drop to approximately $300 million per year starting with the second year, when improved test kits for detecting the presence of lead-based paint are assumed to become available. Over $200 million per year of the cost in subsequent years is due to the work practice requirements in housing previously covered by the opt-out provision. Training for renovators and workers and certification for firms working in housing previously covered by the opt-out provision is estimated to add approximately $50 million per year to the cost. Requiring renovators to provide owners and occupants with copies of the recordkeeping required to document compliance with the RRP rule training and work practice requirements costs approximately $30 million per year, with about two thirds of this incurred in housing that was previously eligible for the opt-out provision.” EPA further caveats: “Note that the costs of this proposed rule as estimated in the Economic Analysis are expressed in 2005 dollars. To express values in terms of current dollars, the Implicit Price Deflator for Gross Domestic Product as determined by the Bureau of Economic Analysis can be consulted for an indication of how nominal prices for goods
and services produced in the economy have changed over time. From 2005 to the second quarter of 2009, the implicit price deflator increased from 100 to 109.753, a difference of approximately 10%”

9. See 74 FR 55506 (Notice of Proposed Amendment) at 55509, where EPA articulates its proposed amendment: “After further consideration of the opt-out provision, the Agency believes it is in the best interest of the public to remove the provision. EPA has decided it is important to require the RRP work practices and training and certification requirements in target housing even if there is no child under age 6 or pregnant woman residing there. While the RRP rule focused mainly on protecting young children and pregnant women from lead hazards, exposure can result in adverse health effects for older children and adults as well. By removing the opt-out provision the rule will go farther toward protecting older children and adults occupants of target housing where no child under age 6 or pregnant woman resides.” Contrast with EPA’s explanation and analysis of the final rule (emphasis added in bold):

“EPA has carefully considered the issues and concerns raised with respect to exceptions to the rule. On the one hand, EPA agrees with the commenters that believed it was important to focus this regulation on the housing that presents the greatest risk to young children. EPA is mindful of the impacts this regulation may have on the affordability of renovations, particularly for low-income homeowners. EPA believes that primarily focusing society’s resources on the housing that presents the greatest risk to children is consistent with Congressional intent. In the Senate report on Title X, Congress noted the need “for a flexible, targeted approach for protecting children from exposure to lead hazards while maintaining housing affordability’’ (Ref. 25). The report also noted that “exposure to lead is primarily caused by ingesting paint dust or chips,” which is the route of exposure of concern primarily for young children, ages 18–27 months. Indeed, in the Congressional findings for Title X, Congress focused on the lead poisoning of children and the need to address this as a national priority. [Sec. 1002, Public Law 102–550]. The focus on children can also be inferred from the very definition of ‘‘target housing’’ which on the one hand excludes housing for the elderly and disabled ‘‘unless a child under six resides or is expected to reside’’ there. Similarly, this final rule focuses on the population most at risk and does not provide any exceptions if a child under age 6 resides in the target housing to be renovated. On the other hand, EPA understands and shares some of the concerns expressed by those commenters who did not support an exception for owner-occupied target housing where no child under 6 resides. In balancing these countervailing considerations, EPA has further limited this exception to owner-occupied target housing that
does not meet the definition of a child-occupied facility because no child under 6 is present on a regular basis and in which no pregnant women reside. This has the effect of focusing this regulation primarily on renovations performed in buildings where children under age 6 reside or spend a great deal of time or in which a pregnant woman resides.

With regard to older children and adults, it is important to remember that the hazards presented by a particular floor or windowsill dust lead level are markedly different for a toddler than for an older child or an adult. As discussed in EPA’s most recent Air Quality Criteria for Lead document, hand-to-mouth behavior is an important means of exposure for children. The period of peak exposure, reflected in peak blood lead levels, is around 18–27 months when hand-to-mouth activity is at its maximum. This leads to a high rate of ingestion of dust at a time when children are believed to be particularly vulnerable to the neurological effects of lead exposure. While lead exposure continues to affect older children and adults, these individuals do not ingest dust at the same high rate that a toddler does. Therefore, the same floor dust level will present a much greater hazard for the young child than it will for the older child or adult. The lead-based paint hazard standards in 40 CFR part 745, subpart D, were established with reference to impacts on childhood blood lead levels based principally on hand-to-mouth activity, and EPA has not assessed the effect of dust lead levels or other potential sources of lead-based paint hazards on older children or adults.

However, EPA is particularly concerned about exposure to pregnant women because while the exposure patterns for small children and older children and adults are different, once exposed a pregnant woman can transfer lead to the developing fetus. Epidemiologic evidence indicates that lead freely crosses the placenta resulting in continued fetal exposure throughout pregnancy. Of particular concern is transfer to the developing brain of the fetus across the poorly developed blood brain barrier. Further, a significant proportion of lead transferred from the mother is incorporated into the developing skeletal system of the offspring, where it can serve as a continuing source of toxic exposure (Ref. 1). Thus, EPA agrees with the commenters who believed it is important to ensure that the work practices required in this final rule are followed in homes where a pregnant woman resides.”

EPA also acknowledges the concern expressed by a number of commenters that newly renovated housing will be sold to a family with young children. If the renovation was not performed in accordance with the work practices prescribed by this rule, a dust-lead hazard may be present in the home. However, EPA does not believe it is an effective use of society’s
resources to impose this final rule requirements on all renovations in order to account for the portion of homes without young children that will be sold to families with young children following renovations. Moreover, the Disclosure Rule, 40 CFR part 745, subpart F, requires sellers of target housing to disclose known lead-based paint or lead-based paint hazard information to purchasers and provide them with a copy of the lead hazard information pamphlet entitled Protect Your Family From Lead in Your Home (Ref. 7). In the situation described by the commenters, the receipt of this information should prompt the family to inquire about potential lead-based paint hazards in the home, particularly if one of the selling points is that areas of the home have been recently renovated. In addition, EPA continues to recommend that purchasers take advantage of their statutory opportunity to have a lead-based paint inspection or risk assessment done while in the process of purchasing target housing.

In response to comments expressing concern about this exception from this final rule, EPA has further considered the proposed owner-occupant acknowledgement statement and concluded that it is important that homeowners understand the effect of the acknowledgement. Accordingly, EPA has clarified and expanded the acknowledgement language to ensure that it is clear and consistent. In addition, EPA would like to make it clear that even if the housing to be renovated qualifies for this exception, the homeowner may always choose to have the renovation firm follow the work practices required by this rule. For example, the homeowner may be concerned about potential exposures for visiting children who do not visit often enough to make the housing a child-occupied facility. The homeowner may also be concerned that she may be pregnant, even though she is not yet certain. EPA has added a statement to the sample acknowledgment form that would allow the homeowner to state that the housing does qualify for the exception, but the homeowner wishes the renovation firm to follow the requirements of this rule anyway. See 73 FR 21692 (Notice of Final Rule) at 21709, 21710.

10. Legislation to incentive energy efficiency upgrades in older homes and buildings applies to the same housing stock subject to the LRRP. We agree this is an effective approach towards improving building energy efficiency. However, we also believe that the multi-billion dollar HOME STAR for residential retrofits, designed to quickly create jobs through efficiency upgrades to older homes, is at risk of derailing compliance with the LRRP, or vice versa, that compliance with the LRRP will subvert the ability to deliver jobs and save energy in the oldest, least-efficient housing stock.
We note that there is a precedent for a solution which we believe could be employed to address these concerns: In September 2000, U.S. Department of Housing and Urban Development (HUD) created a transition period for HUD’s implementation of the “Lead Safe Housing Regulation.” See “Notice of Transition” (65 Federal Register 54858). HUD program participants who sought to take advantage of the transition period were required to file a “Statement of Inadequate Capacity”, which stated that “trained, licensed (certified) or accredited personnel or firms are either not available in sufficient numbers or are not available at a reasonable cost to make it practicable to comply with the Lead Safe Housing Regulation.” HUD’s rule, like EPA’s LRRP Rule, was authorized by Congress under Title X and required contractors working in HUD-owned or assisted housing to attend a HUD-approved training course in lead-safe work practices before disturbing painted surfaces in target housing. Although the rule was scheduled to become effective on September 15, 2000, based on the lack of trained contractors to do the work required in certain areas, HUD delayed the rule by at least 6 months and up to one year in those areas where “the market for the services required under the regulation may not yet have reached the point where the requisite expertise is reasonably available for all programs and requirements of the regulation.”