

December 6, 2021

Hon. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: DocketID No. EPA-HQ-OECA-2021-0763; Comments on EPA’s “Withdrawal of Two Answers to Frequent Questions About Property Management Companies and the Toxic Substances Control Act Lead-Based Paint Renovation, Repair, and Painting Rule”

Dear Administrator Regan:

The National Multifamily Housing Council (“NMHC”), the National Apartment Association (“NAA”), the National Association of REALTORS® (“NAR”), the Institute of Real Estate Management (“IREM®”), and Council for Affordable and Rural Housing (“CAHR”) submit the foregoing comments in response to the Environmental Protection Agency’s (“EPA” or “Agency”) November 4, 2021, Notice of the Intent (“Notice”) to withdraw two Frequently Asked Questions (“FAQs”) concerning property management companies (“PMCs”) and their compliance responsibilities under the Toxic Substances Control Act (“TSCA”) Lead Renovation, Repair and Painting Rule (“RRP Rule”).¹

Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. NMHC’s members engage in all aspects of the apartment industry, including ownership, development, management, and finance, who help create thriving communities by providing apartment homes for 40 million Americans. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. Over one-third of American households rent, and nearly 20 million U.S. households live in an apartment home (buildings with five or more units).

NAA serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 149 state and local affiliates, NAA encompasses over 93,000 members representing more than 10.5 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity, and innovation.

With 1.5 million members, NAR is America’s largest trade association. Membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in all aspects of the real estate industry.

IREM® is an international institute for property and asset managers, providing complete knowledge to take on real estate management’s most dynamic challenges. For over 85 years, our members have made us the world’s strongest voice for all things real estate management. Today, almost 20,000

¹ “Withdrawal of Two Answers to Frequent Questions About Property Management Companies and the Toxic Substances Control Act Lead-Based Paint Renovation, Repair, and Painting Rule,” 86 Fed. Reg. 60812 (Nov. 4, 2021).

leaders in commercial and residential management call this home for learning, certifications, and networking.

CARH is a national industry trade association with headquarters in Alexandria, Virginia. For over 40 years, CARH has represented the interests of for-profit and non-profit builders, developers, management companies, and owners, as well as financial entities and suppliers of goods and services to the affordable rental housing industry in rural communities throughout the country.

The members of our organizations are deeply committed to providing safe, affordable, and accessible housing. Therefore, our members provide quality apartment homes across the nation and invest in worker training, lead inspections, disclosure activities, and staff and resident education, to support the national goal of eliminating childhood lead poisoning.

Our organizations have been actively engaged with the Agency on rulemakings under the Residential Lead-Based Paint Hazard Reduction Act, including the RRP Rule. Our members participated in Small Business Regulatory Enforcement Fairness Act (SBREFA) panels on the development of the RRP Rule. Our organizations worked with EPA to educate the industry on the requirements of lead-safe work practices, including sponsoring education and training sessions. We have also engaged in periodic stakeholder meetings specifically on the RRP Rule with the Agency prior to March 2020. With this history of long-standing, constructive engagement, we were surprised and disappointed that EPA failed to consult with us prior to issuing the Notice. Not only does it ignore the statutory mandate to work together, but it also undermines the significant relationships that we have built together to protect the most vulnerable among us from lead exposure.

As set forth below, EPA's Notice violates the clear text of TSCA Section 402, the terms of the RRP Rule, and the Administrative Procedure Act ("APA"). **The Agency simply cannot use the FAQs as a means to change the substantive requirements and applicability of the RRP Rule.** Instead, EPA must first publish for notice and comment proposed changes to the RRP Rule and include legal, technical, and policy justifications for those changes. If such justifications exist, after meaningful consideration of the comments submitted, only then could EPA issue potential revisions to the RRP Rule.

Given these legal deficiencies, we respectfully request that EPA expeditiously withdraw the Notice and consult with stakeholders to collaborate together on how to address the issues that EPA identified in the Notice.

Statutory and Regulatory Background

Section 402(a) of TSCA required the EPA Administrator to "promulgate final regulations governing *lead-based paint activities* to ensure that individuals *engaged in such activities* are properly trained; that training programs are accredited; and that contractors *engaged in such activities* are certified."² Section 402(c) directed the EPA Administrator to revise these regulations and apply them to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.³ EPA needed to "determin[e] which contractors are *engaged in such activities*" by utilizing the results of a study conducted under the same section of TSCA

² 15 U.S.C. § 2682(a) (emphasis added).

³ *Id.* § 2682(c)(3).

and “consult[ing] with the representatives of labor organizations, lead-based paint activities contractors, persons engaged in remodeling and renovation, experts in lead health effects, and others.”⁴

Based on this statutory mandate, EPA issued its RRP Rule on April 22, 2008.⁵ As the Notice acknowledged, “[w]hen the EPA developed the RRP rule, as required by section 402(c) of TSCA, it defined the scope of the RRP rule based on the circumstances of the renovation, repair and painting activity, rather than the person or entity performing the renovation.”⁶ Indeed, the relevant regulatory provision states that the RRP Rule “applies to all *renovations performed for compensation* in target housing and child-occupied facilities.”⁷ EPA identified that one of the primary purposes of the RRP Rule was “to ensure . . . [i]ndividuals *performing renovations* . . . are properly trained; renovators and firms performing these renovations are certified; and the work practices [in the regulation] are followed.”⁸ Finally, EPA codified a prohibition stating that “no firm may *perform, offer, or claim to perform renovations* without certification from EPA.”⁹

The preamble to the RRP Rule also articulated to whom it applies: “[r]enovations . . . are covered *if they are performed by employees of the renovation contractor, the building owner, the building manager, a State or local government agency, a non-profit organization, or the child-occupied facility operator, and the employees receive wages or other compensation for the work performed.*”¹⁰ EPA further reiterated that “[f]irms covered by this final rule include firms that typically perform renovations, such as building contractors or home improvement contractors, as well as *property management companies or owners of multi-family housing performing property maintenance activities that include renovations* within the scope of this final rule.”¹¹

In light of these statutory and regulatory requirements, EPA’s April 2008 “Response to Public Comments” document provided additional clarity and consistency in the applicability of the RRP Rule.¹² For example, EPA explained that it believed that “rental housing management firms will either become certified firms and employ at least one certified renovator, *or will contract with a certified maintenance company.*”¹³ Similarly, the Agency stated that “[p]roperty management firms are required to be certified *if they perform renovations* in target housing.”¹⁴ Even more revealing, EPA asserted that “[t]he rule does not require any individuals to become trained *unless they are performing renovations.*”¹⁵

⁴ *Id.*

⁵ “Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).”

⁶ 86 Fed. Reg. at 60814.

⁷ 42 C.F.R. § 745.82(a); *see also* 73 Fed. Reg. at 21707 (“This rule, like the Pre-Renovation Education Rule, *only applies to persons who perform renovations* for compensation . . . and compensation includes pay for *work performed.*”) (emphasis added).

⁸ *Id.* § 745.80(b) (emphasis added).

⁹ *Id.* § 745.81(a)(2) (emphasis added).

¹⁰ 73 Fed. Reg. at 21708 (emphasis added).

¹¹ *Id.* at 21725 (emphasis added).

¹² Attachment A.

¹³ *Id.* at 8 (emphasis added).

¹⁴ *Id.* at 162 (emphasis added).

¹⁵ *Id.* at 280 (emphasis added).

The FAQs at Issue

On November 4, 2021, EPA published its Notice to announce the Agency's intent to withdraw two FAQs related to the RRP Rule—and effectively revise the definition of covered activities—by March 21, 2022.

According to the Notice, the first FAQ to be withdrawn “indicated the EPA’s prior statement that a PMC did not need to obtain firm certification for itself or renovator certification for an employee if none of its employees ‘do the work’ of the renovations.”¹⁶ Specifically, this FAQ is as follows:

Question (23002-13650): A property management company performs most of the clerical functions of the business, and hires plumbers, electricians, carpenters, etc., for its renovation needs. Does the property management company need firm certification?

Answer: A property management company acts as an agent for the landlord and has the same responsibilities as the landlord under the RRP Rule. Therefore, if the property management company uses its own employees to do the work, the property management company must be a certified firm and one of the employees must be a certified renovator. If the property management company hires a renovation firm to perform the renovation, the property management company does not need firm or renovator certification, but the firm the property management company hires must be certified and must perform the renovation using a certified renovator that directs and provides on-the-job training to any workers that are not certified renovators.

The Notice states that the second FAQ to be withdrawn “explained how the EPA would exercise its enforcement discretion under circumstances in which a certified firm hired by the PMC fails to comply with a requirement of the RRP rule.”¹⁷ Specifically, this FAQ is as follows:

Question (23002-18348): If a property management company hires a certified firm to perform a renovation and the firm violates the RRP Rule, for example, by failing to distribute the necessary materials or keep proper records, which entity is subject to enforcement action, the property manager or the certified firm?

Answer: It is the certified firm’s responsibility to comply with the requirements of the RRP Rule, and any enforcement action taken would be against the firm.

Created in 2010, these two FAQs are merely consistent with the requirements of TSCA Section 402, the RRP Rule, and the administrative record developed in support for the RRP Rule—in addition to similar information that EPA has posted on its website.¹⁸ Despite this fact, the Notice states that, upon withdrawal of the two FAQs, “the EPA would assess compliance by PMCs with the RRP rule, as it would

¹⁶ 86 Fed. Reg. at 60813.

¹⁷ *Id.* Despite the characterization that this FAQ discusses EPA’s “enforcement discretion,” in reality, the Agency was simply restating the regulatory requirements and obligations of the certified firm. In this scenario, the property management company did not have any responsibility to comply with the RRP Rule, and therefore did not need “enforcement discretion” to avoid any enforcement action.

¹⁸ Separate from the FAQs, EPA’s website also contains information on how property managers can comply with the RRP Rule. See Attachment B at 1 (If property managers or their employees do not conduct RRP activities in a pre-1978 residential building, “then [they should] hire only a Lead-Safe Certified firm for building maintenance, repair, or painting activities that could disturb lead-based paint.”)

for any other entity, according to the broadly applicable language of the RRP rule.”¹⁹ The Agency “will evaluate compliance and appropriate enforcement actions on the basis of each case’s individual facts and circumstances, and the EPA may exercise its enforcement discretion regarding PMC obligations.”²⁰

As part of the Notice, EPA provides certain guidance on how the Agency would construe certain actions as “compensation” for renovation, repair, or painting activities. These actions include:

- Soliciting and evaluating contractor bids;
- Granting contractors access to the property;
- Overseeing contractor work on the property; and
- Remitting payment to the contractors.²¹

The Notice asserts that “[c]ompensation of a PMC by the property owner for any of these or similar activities may establish that a PMC is performing a renovation for compensation and must comply with the RRP rule, even if the PMC uses an independent contractor instead of its own employees to do the specific activities that disturb paint surfaces.”²²

Discussion

With this background and context, it is clear that TSCA and the RRP Rule prevent EPA from requiring PMCs to become certified if their employees do not perform renovation activities that trigger the requirements of the RRP rule. Merely removing two FAQs most certainly does not change the regulatory and compliance obligations of PMCs and any other firm or individual who is the subject of EPA’s Notice.

The RRP Rule is unambiguous that it applies only to “renovations performed for compensation.”²³ As previously discussed, the preamble to the adoption of the RRP Rule confirmed that it “applies to persons who perform renovations for compensation.”²⁴ The FAQs focused on the meaning of the word “perform” and equated it, correctly, with actually engaging in renovation work (*e.g.*, “do[ing] the work”; “direct[ing] and provid[ing] on-the-job training” to renovation workers). This interpretation is consistent with the plain language of the RRP Rule and the sections of TSCA that it implements. 15 U.S.C. § 2682(a)(1) (directing promulgation of regulations to ensure that “individuals *engaged in* [lead-based paint activities are] properly trained . . . contractors *engaged in* such activities are certified.”) (emphasis added); *id.* § 2682(b) (directing promulgation of regulations to ensure “each person who performs for compensation a renovation of target housing” distributes hazard information pamphlets).

The Notice simply and impermissibly attempts to re-write the RRP Rule. While it purports only to rescind the FAQs, the Notice in fact goes further and redefines what it means to “perform” a

¹⁹ 86 Fed. Reg. at 60813.

²⁰ *Id.*

²¹ *Id.* at 60815.

²² *Id.*

²³ 40 C.F.R. § 745.82.

²⁴ 73 Fed. Reg. at 21707.

renovation.²⁵ It endeavors to accomplish this goal by suggesting that “performing” the work may also include tasks that are “necessary or even integral to the performance of the work,” such as facilitating site access or paying a contractor.²⁶ Indeed, the Notice states that the applicability of the RRP Rule will be “established” if a PMC merely “performs some other action necessary to ensure the performance of a renovation activity.”²⁷

The Agency cannot rewrite the RRP Rule in this manner. The combination of the rescission of the FAQs and the unequivocal language in the Notice about what will “establish RRP Rule applicability” going forward represents a significant change in scope of covered activities against the backdrop of a regulation duly promulgated through notice and comment. EPA cannot “effectively amend” the RRP Rule without full notice-and-comment procedures. *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30, 66 (D.D.C. 2020) (citing *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). EPA is explicit in its decree that application of its new interpretation of the RRP Rule will require certain PMCs to obtain certifications that they were not previously required to obtain based solely on the RRP Rule, its preamble, the Agency’s Response to Comments, and the FAQs’ interpretation thereof. The Notice must undergo full notice-and-comment rulemaking, including development of a new administrative record, because EPA is creating a new burden on PMCs by reasonably leading them to believe that they will suffer adverse consequences if they do not obtain certification. *Ciox Health*, 435 F. Supp. 3d at 66; *cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

EPA’s quasi-notice approach is particularly ill-suited to address any concerns the Agency may have over the scope of the RRP Rule.²⁸ *First*, EPA is relying on its own “experience implementing the RRP Rule” as a changed factual scenario from when it issued the FAQs—without consulting regulated entities who could provide additional facts to address EPA’s concerns. *Second*, EPA’s longstanding interpretation and application of the RRP Rule “has engendered serious reliance interests that must be taken into account.” See *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106 (2015). Failing to provide more substantive justifications for its change in approach is therefore necessary for the Agency to avoid a finding that the Notice and rescission are arbitrary, capricious, and otherwise contrary to law. *Id.*

Finally, EPA is purportedly concerned that an uncertified PMC “might offer to perform renovation, repair, or painting activities . . . and in other cases the PMC might perform an element of the renovation for compensation.”²⁹ Similarly, the Agency’s press release states that EPA seeks “to improve compliance

²⁵ EPA’s purported new definition is so broad that it would appear to require any homeowner, property owner, real-estate agent, or general contractor to become certified if they hire someone else to perform a renovation or repair subject to the RRP Rule.

²⁶ 86 Fed. Reg. at 60815.

²⁷ *Id.*

²⁸ EPA’s press release seems to acknowledge this quasi-notice approach: “Through this *proposed action*, the EPA will improve compliance with the RRP Rule in rental properties managed by property management companies and protect tenants from lead exposure.” News Release, “EPA to Hold Building Managers Responsible for Lead-Based Paint Safety Requirements,” <https://www.epa.gov/newsreleases/epa-hold-building-managers-responsible-lead-based-paint-safety-requirements> (emphasis added). The press release also indicates that EPA leadership may fundamentally misunderstand the scope of the RRP Rule: “Holding property management companies accountable for the same lead safe work practices that other firms are held to is an important step towards ensuring all communities are protected from the dangerous health effects of lead.” *Id.* As previously noted, the preamble to the RRP Rule expressly acknowledged that PMCs are covered by the requirements *if* they perform renovations that fall within the scope of the regulations. 73 Fed. Reg. at 21725 (emphasis added).

²⁹ 86 Fed. Reg. at 60814.

and strengthen enforcement” against PMCs “that perform, offer, or claim to *perform regulated renovations without certification*.³⁰ If EPA is concerned about known (but not publicly disclosed) violators of the RRP rule, the Agency already has the enforcement tools to pursue these actors. And if EPA believes that the current terms of the RRP Rule inhibit enforcement, the Agency certainly knows how to overcome such obstacles. Indeed, EPA’s Draft Lead Strategy stated that “EPA will address gaps in selected Agency policies pertaining to lead-safe work practice standards and other lead-based paint requirements that create barriers to more effective enforcement, *such as revisiting the RRP rule*.”³¹

The subliminal message in the Notice, however, portrays PMCs as nefarious companies who “hire smaller, uncertified firms to conduct RRP activities” as a means to avoid liability and cut costs. Nothing could be further from the truth. In reality, our members have a strong interest in using properly trained and certified firms and workers to carry out RRP activities as these activities, if improperly performed, may result in the creation of lead hazards that would threaten the health and safety of our residents and staff. PMCs frequently use specially trained experts to carry out tasks on legacy building components that are now recognized to be hazardous (*e.g.*, lead and asbestos). Moreover, it would be economically irrational for PMCs to cut costs by hiring uncertified contractors at the risk of exposing themselves to potentially far more significant liability for related lead hazards.

Conclusion

NMHC, NAA, NAR, and IREM® are more than willing to collaborate with EPA to discuss the Agency’s experience enforcing the RRP Rule and assist the Agency with outreach to improve compliance. EPA, however, appears to be incorrectly conflating two unrelated issues—noncompliance by lead-paint renovation firms and a desire to revise the RRP Rule in a manner that would more broadly regulate PMCs. As discussed above, EPA already possesses sufficient authority to pursue violations of the RRP Rule and should use this authority when it identifies the violations alleged in the Notice. We respectfully request that EPA rescind its Notice and, as TSCA requires, consult with stakeholders prior to taking any regulatory action.

NMHC, NAA, NAR, and IREM® would appreciate a response from EPA by Friday, December 17, 2021, as it would be in everyone’s best interests to resolve this matter expeditiously and efficiently. The Notice’s expectation that PMCs will use the 135 days from the date of publication to obtain any needed certification requires such a swift response.

³⁰ News Release, “EPA to Hold Building Managers Responsible for Lead-Based Paint Safety Requirements,” <https://www.epa.gov/newsreleases/epa-hold-building-managers-responsible-lead-based-paint-safety-requirements> (emphasis added).

³¹ “EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities,” p. 19, <https://www.epa.gov/system/files/documents/2021-11/updated-public-comment-draft-lead-strategy-11-16-2021.pdf> (emphasis added).

Please feel free to contact me at elee@nmhc.org if you have any questions regarding these comments or if you would like to schedule a meeting discuss our concerns with the Notice. We appreciate your prompt attention to this matter.

Sincerely,

Eileen Lee, Ph.D.
Vice President, Energy and Environmental Policy
National Multifamily Housing Council

Attachments

cc: Mr. Jeffrey Prieto
General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
Prieto.Jeffrey@epa.gov

Dr. Michal Ilena Freedhoff
Assistant Administrator
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
Freedhoff.Michal@epa.gov

Ms. Tabby Zeb
Assistant Chief Counsel
Office of Advocacy
U.S. Small Business Administration
Tayyaba.Zeb@sba.gov

Mr. Erik C. Baptist
Partner
Wiley Rein LLP
ebaptist@wiley.law