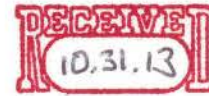


October 31, 2013



Gina McCarthy, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: Citizen Petition to EPA Regarding OSHA Exposure Assessments in Renovations of Public and Commercial Buildings

Dear Administrator McCarthy:

The U.S. Environmental Protection Agency (EPA) convened a public meeting on June 26, 2013 in Washington, DC to receive comments on a potential proposed rule to protect public health from lead poisoning from renovations in public and commercial buildings. At this meeting, some industry trade associations asserted that EPA did not need to pursue rulemaking because the Occupational Safety and Health Administration (OSHA) lead exposure in construction standard at 29 CFR §1926.62 provides sufficient protection to the public. They assumed that the OSHA standard is sufficient to protect the public and that the industry is in full compliance (a point disputed by the Association of Environmental Contractors¹ and others).

Unfortunately, the OSHA standard is focused on inhaled rather than ingested lead and, therefore, has serious shortcomings regarding lead that is left behind for occupants or that is taken home with contaminated tools and clothing. While the standard requires cleanup of lead accumulations “as free as practicable” ((h)(1)) and “wherever possible” ((h)(2)), it provides no evaluation of the effectiveness of the cleanup or testing in non- inhaled dust as part of the exposure assessment. The OSHA standard contains nothing comparable to dust wipe testing or even the ‘white glove’ test that forms the foundation of EPA’s Residential Renovation, Repair, and Painting (RRRP) regulation. OSHA only prohibits the most egregious of clean-up methods such as compressed air or vacuuming without a HEPA filter ((h)(4) and (5)). Shovelng, brushing and sweeping are allowed when other “methods have been tried and found not to be effective” ((h)(3)).

EPA’s analysis of the research in the residential setting makes clear that once lead dust is generated, it is difficult to clean up and that, as a metal, it does not go away over time. Performance must be measured rather than assumed.

Several participants at the June 26 meeting generally acknowledged that EPA needs to study the results of the OSHA standards. For example, the National Apartment Association said “[a]long with the frequency of renovations, EPA must gather reliable data on the practices in commercial buildings when renovations, repairs and painting are performed.”² The Independent Electrical Contractors stated that “EPA should carefully evaluate the OSHA regulations and consider any necessary recommendations before creating a new EPA regulation.”³ Also, the Associated General Contractors of New York State claimed that “EPA must consider the impacts of the existing OSHA requirements in assessing the need for further guidelines or regulation.”⁴ The National Institute of Building Sciences recommended that “EPA should also evaluate the role existing regulations from the Occupational Safety and Health Administration (OSHA) play in protecting both contractors and building occupants from lead exposure.”⁵

We agree.

The recordkeeping required by the OSHA lead regulation at 29 CFR §1926.62(n) would provide EPA with critical information the agency needs to quantify lead hazards caused by construction and renovation in or on public and commercial buildings, including measures taken to reduce exposure risk. With these records, EPA could more accurately and effectively:

- Determine the extent to which lead hazards are present in these buildings;
- Characterize the types of buildings likely to contain these hazards;
- Identify the work practices and types of renovation most likely to generate airborne dust containing lead that may be spread from the workplace, including take-home hazards;
- Understand how exposure risk was reduced; and
- Assess the economic burden caused by these hazards.

Our request:

Therefore, we petition EPA pursuant to TSCA Section 21 (15 U.S.C. §2620) to require property managers, building owners, and contractors disturbing paint on public and commercial buildings for commercial purposes who have employees subject to 29 CFR Part 1926 to submit to the agency pursuant to TSCA Section 8(d) (15 U.S.C. §2607) the following health and safety studies for paint disturbances conducted at any time between January 1, 2011 and December 31, 2012:

1. Personal or area air sampling data and any resultant exposure assessments conducted pursuant to 29 CFR §1926.62(d);
2. Employee medical surveillance data and any resultant evaluation pursuant to 29 CFR §1926.62(j) or medical removals of employees removed from current exposure to lead pursuant to 29 CFR §1926.62(k); and
3. Paint analysis results and any resultant studies that were used to determine whether or not initial exposure monitoring should be required pursuant to 29 CFR §1926.62(n)(4).
4. Data and studies considered in the development of a compliance plan and in the development of any updates pursuant to 29 CFR §1926.62(e)(2), including: descriptions of each activity in which lead is emitted; descriptions of the specific means employed to achieve compliance and, where engineering controls were required, engineering plans and studies used to determine methods selected for controlling exposure to lead.
5. Air monitoring data collected pursuant to 29 CFR §1926.62(e)(2) which documents the source of lead emissions.
6. Data considered in the evaluation of the effectiveness of mechanical ventilation in controlling exposure under 29 CFR 1926.62(e)(3).

The submission should include lists of the studies conducted as well as copies of the actual studies and the data.

Our reasoning that it is in scope of TSCA:

EPA should adopt the rule pursuant to 40 CFR §716.5(b) to require reporting by all persons who own, manage, paint, maintain, repair, or renovate public and commercial buildings who disturb paint on the structures. They have possession of the health and safety studies described above.

These persons are processors because they disturb the paint on these buildings and distribute the paint debris in commerce when they dispose of it as waste. Under 15 U.S.C. §2602(11), the term

“processor” means any person who processes a chemical substance or mixture. The chemicals in paint, including the lead, meet the definition of substances under 40 CFR §716.3. Such chemicals are not impurities since they were intentionally added to the paint during its production. Therefore, paint applied to the structure is clearly a chemical mixture.

15 U.S.C. §2602(10) defines the term “process” as follows:

“The term “process” means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce—
(A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or
(B) as part of an article containing the chemical substance or mixture.”

Disturbing the paint in a public and commercial building qualifies as processing because it changes the form or physical state of the paint, and the resultant paint debris is distributed in commerce when it is sent for disposal. There is a fee associated with the transport and disposition of the debris.

This interpretation is consistent with EPA’s previous interpretation of the term “process.” For example, on May 1, 1997, EPA issued a final rule in its Toxic Release Inventory program that applied a nearly identical definition of process to waste management.⁶ The statute defined the term at 42 U.S.C. §11023(b)(1)(C)(ii) as follows:

“The term “process” means the preparation of a toxic chemical, after its manufacture, for distribution in commerce—
(I) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such chemical, or
(II) as part of an article containing the toxic chemical.”

The records kept pursuant to 29 CFR §1926.62(n) are health and safety studies clearly fitting the examples in 40 CFR §716.3 of “assessments of human and environmental exposure, including workplace exposure . . .” ((2)(iii)) and “monitoring data, when they have been aggregated and analyzed to measure the exposure of humans or the environment to a chemical substance or mixture” ((2)(iv)).

Since the regulation at 40 CFR §716.10(a)(4) foresees EPA’s need for underlying data, and such data will provide the critical information EPA needs to quantify lead hazards caused by construction and renovation in or on public and commercial buildings, including measures taken to reduce exposure risk, the scope of this petition includes these data.

We believe that EPA should propose a rule requesting that personal or area air sampling data (#1 above) and employee medical surveillance data (#2 above) be provided at the same time as any “[m]onitoring data, when they have been aggregated and analyzed to measure the exposure of humans or the environment to a chemical substance or mixture.” We believe this is warranted given the well-characterized relationship – based on human data – between exposure to lead, blood-lead levels and adverse health effects. Considering this relationship (which is not seen for many chemical substances), we believe that the monitoring data can be viewed as health and safety data. Requesting this later by letter per 40 CFR 716.40 would result in an unjustified delay of this information.

Industry has offered to provide necessary information:

As EPA heard at the public meeting, trade associations stand ready to assist. For example, the National Roofing Contractors Association said it “is willing to partner with EPA and other interested stakeholders to assist in research and analysis that can form the basis for suitable regulation of tasks that roofing contractors may be engaged in related to lead-based paint hazards.”⁷

The Commercial Properties Coalition said its members “stand ready to assist EPA further in completing the necessary groundwork for a well-supported decision.”⁸ Where a trade or industry association provides EPA with a summary of the OSHA recordkeeping information in a quantitative format acceptable to the agency before it responds to the petition, the studies would be exempt from reporting pursuant to 40 CFR §716.20(a)(10).

EPA should coordinate with OSHA to identify those studies submitted with no claims of confidentiality since these studies are excluded from reporting by 40 CR §716.20(a)(3). EPA should make clear that the lists of studies conducted must still be submitted by the persons subject to the reporting requirement.

EPA should also consult with OSHA to determine if OSHA has suggestions for additional health and safety studies that EPA should include that in the reporting requirement. Where possible, EPA should include these suggestions, especially since the resultant information may assist OSHA if it chooses to revise 29 CFR §1926.62 to more effectively protect workers or consider more aggressive enforcement. As noted by the National Association of Home Builders in its February 4, 2013 comment⁹ to OSHA on its Standards Improvement Project, the OSHA standard was adopted in 1993 as an interim final rule without notice and comment and should be revised.

We understand that lead dust from residential exposure remains the major source of childhood lead poisoning, especially when EPA has not undertaken a systematic enforcement effort to ensure compliance with its RRRP regulations. However, there is no safe level of exposure to lead for children or adults. We believe it is critical for the agency to protect all Americans from lead hazards created by renovations of public and commercial buildings as required by the Lead-Based Paint Hazard Reduction Act of 1992.

We look forward to your response to this petition.

Sincerely,

Rebecca Morley
National Center for Healthy Housing

Ken Rigmaiden
International Union of Painters & Allied Trades

Steve Weil
Lead and Environmental Hazards Association
National Association of Lead and Healthy Homes Grantees

¹ Association of Environmental Contractors comment posted July 12, 2010 at EPA-HQ-OPPT-2010-0173-0072

² National Apartment Association comment posted July 11, 2013 at EPA-HQ-OPPT-2010-0173-0186

³ Independent Electrical Contractors comment posted June 3, 2013 at EPA-HQ-OPPT-2010-0173-0176

⁴ Associated General Contractors of New York State comment posted on April 30, 2013 at EPA-HQ-OPPT-2010-0173-0161

⁵ National Institute of Building Sciences comment posted on April 3, 2012 at EPA-HQ-OPPT-2010-0173-0153

⁶ 62 Fed. Reg. 23834, May 1, 1997, Addition of Facilities in Certain Industry Sectors; Revised Interpretation of Otherwise Use; Toxic Release Inventory Reporting; Community Right-to-Know; Final Rule

⁷ National Roofing Contractors Association comment posted July 12, 2010 at EPA-HQ-OPPT-2010-0173-0073

⁸ Commercial Properties Coalition comment posted April 3, 2013 at EPA-HQ-OPPT-2010-0173-0154

⁹ National Association of Home Builders. 2013. "Docket No. OSHA-2012-0007 Standards Improvement Project—Phase IV: *Request for Information*." See www.nahb.org/fileUpload_details.aspx?contentID=207201&fromGSA=1.