



VIA ELECTRONIC SUBMISSION

August 6, 2010

Maria J. Doa, Director
National Program Chemicals Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1201 Constitution Avenue, NW, Room 4355A
Washington, DC 20460

Re: Notice of Proposed Rulemaking – Lead: Clearance and Clearance Testing Requirements for the Renovation, Repair, and Painting Program; Docket ID EPA-HQ-OPPT-2005-0049; RIN 2070-AJ57

Dear Director Doa:

Associated Builders and Contractors, Inc. (ABC), submits the following comments to the U.S. Environmental Protection Agency (EPA or Agency), in response to the above-referenced notice of proposed rulemaking, published in the *Federal Register* on May 6, 2010, at 75 Fed. Reg. 25038.

ABOUT ASSOCIATED BUILDERS AND CONTRACTORS, INC.

ABC is a national construction industry trade association representing more than 25,000 merit shop contractors, subcontractors, materials suppliers and construction-related firms within a network of 77 chapters throughout the United States and Guam. ABC member contractors employ more than two million construction workers, whose training and experience span all of the twenty-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses.

Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of full and open competition unfettered by the government, nondiscrimination due to labor affiliation, and the award of construction contracts to the lowest responsible bidder through open and competitive bidding.

BACKGROUND ON EPA'S PROPOSED RULE

In 1992 Congress passed the Residential Lead-Based Paint Reduction Act, commonly referred to as "Title X." Pub. L. 102-550, tit. X (codified in part at 15 U.S.C. §§ 2681-92). Among other things, that title added a new Subchapter IV to the Toxic

Substances Control Act, 15 U.S.C. § 2601 *et seq.*, (TSCA) and as part of that subchapter directed EPA to develop regulations to reduce exposure to lead by enacting requirements for individuals involved in maintenance, remodeling and construction activities in certain types of buildings, including “target housing.” 15 U.S.C. § 2682. “Target housing” is defined, with some exceptions, as “any residential structure built prior to 1978 where a child under six resides or is likely to reside.” *See* 42 U.S.C. § 4851b(27).

In April 2008, EPA published its regulation concerning the Lead Renovation, Repair and Painting program for renovation, repair and painting (RRP) activities in target housing. 73 Fed. Reg. at 21692 (April 22, 2008) (Rule or LRRP Rule). The purpose of the Rule is to “reduce exposure to lead hazards created by renovation, repair, and painting activities that disturb lead-based paint.” *Id.* Under the Rule, new requirements for renovation work practices were established. The renovation work practices include a requirement that renovators engage in what EPA refers to as “cleaning verification” to ensure that the work area has been cleaned in accordance with the requirements set forth in the Rule. 71 Fed. Reg. at 1613-14. The verification procedure includes both a visual inspection of the work area after the required cleaning steps have been conducted as well as the use of a “white glove” test. *Id.* At 1630. These work practice requirements apply to all commercial enterprises engaging in RRP activities but do not apply to homeowners who conduct RRP activities themselves. *Id.* At 1602.

For the second time in less than two years, EPA has proposed changes to the Rule. *See* 75 Fed. Reg. 24802 (May 6, 2010), 40 C.F.R. §§ 745.81 – 745.82; *see also* 75 Fed. Reg. 25038 (May 6, 2010). “Specifically, EPA is proposing to require dust wipe testing after many renovations covered by the Rule.” *Id.* At 25039. EPA is also proposing requirements for clearance testing in some instances, as well as requirements related to training, certification and accreditation. *Id.* However, the proposed amendments to the Rule regarding dust wipe testing and clearance testing suffer from a number of serious legal deficiencies and should be reconsidered by the Agency.

ABC’S COMMENTS IN RESPONSE TO EPA’S PROPOSED RULE

I. EPA Lacks the Authority Under the Toxic Substances Control Act to Impose Dust Wipe Testing or Clearance Requirements on Renovators

There are several key respects in which the proposed amendments to the Rule, to the extent they include requirements for any form of dust wipe testing or clearance testing, would exceed the statutory authority Congress granted to EPA under Title X.

A. EPA can only issue guidance concerning renovation work practices¹

Based on the plain language of the statute, EPA lacks authority under TSCA to promulgate regulations requiring any form of clearance testing because such requirements are part of work practice standards, which can only be the subject of Agency guidelines. Section 402(a)(1) of TSCA only authorizes EPA to promulgate regulations “to ensure that

¹ Lead-safe work practices do provide health and safety benefits. However, EPA is without the authority to require such practices. Nevertheless, contractors that comprise the regulated community endeavor to use work practices that protect human health and the environment.

individuals engaged in [lead-based paint] activities are properly *trained*; that training programs are *accredited*; and that contractors engaged in such activities are *certified*.” 15 U.S.C. § 2682(a)(1) (emphasis added). Moreover, while the statute also grants EPA authority to create standards for “lead-based paint activities,” such activities are defined, in the case of target housing, as “risk assessment, inspection, and abatement.” 15 U.S.C. § 2682(b)(1). Accordingly, work involving renovation, repair and painting is not included under the “lead-based paint activities” definition.

In enacting Section 402(c), Congress was very careful to distinguish between lead-based paint activities and RRP activities and that section does not explicitly authorize EPA to promulgate regulations affecting the work practice standards for RRP activities, *e.g.*, requiring clearance testing. Instead, Congress authorized EPA to “promulgate *guidelines* for the conduct” of RRP activities and to require certification of RRP firms that are engaged in activities that create lead-based hazards. 15 U.S.C. § 2682(c)(1) and (3). The statute also requires EPA, after undertaking certain studies, to revise the regulations developed for abatement and other lead-based paint activities to apply to RRP activities. *Id.* § 2682(c)(3). Thus, Congress intended that EPA would apply appropriate certification requirements developed in connection with lead-based paint activities to RRP contractors but that work practice standards – including clearance testing requirements – would remain the subject of guidelines, not regulations.

Further, the plain meaning of the statute is supported by the fact that the provision requiring EPA to engage in a study prior to promulgating regulations for RRP activities (Section 402(c)(2)) is entitled “Study of certification” and the provision concerning subsequent promulgation of regulations (Section 402(c)(3)) is headed “Certification determination.” *See I.N.S. v. National Center for Immigrants’ Rights, Inc.*, 502 U.S. 183 (1991) (section titles can serve as aids to the construction of statutory language where the language is ambiguous); *see also Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (the title of a section is an indication of its meaning). In contrast to the preceding provision concerning guidelines for work practice standards, the focus of Section 402(c)(2) and (3) is the certification of contractors. Therefore, the focus of rulemaking development under Section 402(c)(3) must be on certifications of contractors and any attempt by EPA to require contractors to comply with work practice standards such as any form of clearance testing is beyond EPA’s statutory authority.

B. EPA has not established that all the activities being regulated create lead-based paint hazards

EPA’s proposed dust wipe testing and clearance testing requirements also exceed the Agency’s authority because EPA has not established that the activities it seeks to regulate create lead-based paint hazards. Any activity that does not create a lead-based paint hazard “does not require certification” under Section 402(c)(3) and cannot be regulated by EPA. *See Comments by the National Ass’n of Home Builders Regarding EPA’s Proposed Rule: Lead Renovation, Repair and Painting Program*, Published in the *Federal Register*, January 10, 2006 at 71 FR 1587, Section II(C) (NAHB LRRP Rule Comments) (May 25, 2006). (“In those cases where EPA has not demonstrated that typical RRP activities create lead hazards, the Agency is prohibited from addressing them in this

rule”). Such RRP activities may only be subject to EPA guidelines. *See* 15 U.S.C. § 2628(c)(1).

The Agency may not impose the type of clearance requirements it has proposed because it has failed to demonstrate that RRP activities create the type of hazard that is a predicate for regulation under Section 402(c). The statute does not authorize EPA to regulate RRP activities simply because they disturb lead-based paint, as RRP activities may do. Instead, Section 402(c)(3) requires EPA to promulgate regulations with respect to RRP activities only where such activities create a lead-based paint hazard. The statute does not provide specific authorization to EPA to regulate RRP activities that do not create a lead-based paint hazard. Consequently, from that silence EPA lacks authority to regulate RRP activities unless they create a lead-based paint hazard. *See, e.g., In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (where Congress knows how to say something but chooses not to, its silence is controlling). Therefore, because Section 402 is silent as to EPA’s authority to regulate RRP activities that do not cause a lead-based paint hazard, such authority is lacking.

EPA does not address this aspect of the extent of its regulatory authority in the proposed amendments because it has purported to find that all RRP activities that disturb lead-based paint create a lead-based paint hazard. However, there is a lack of evidence to support such a conclusion. Generally, most RRP activities either eliminate or reduce the potential for future lead-based paint hazards. For example, the Mercatus Report stated that “evidence collected [in EPA’s Study] following the passage of the statute has indicated that lead hazards created by renovation and remodeling work are minimal, and RRP work removes chipping and deteriorating paint – two of the leading causes of elevated blood-lead levels.” *See* Comments of the Regulatory Studies Program, Mercatus Center, George Mason University at 30 (May 25, 2006) (*Mercatus Report*).

Other studies have reached similar conclusions. NAHB’s own study noted that “when considering lead dust loading on surfaces throughout a single property, results showed that overall all but one of the properties evaluated showed *lower levels of lead dust when R&R contractors completed the work than when they arrived.*” NAHB, *Lead-Safe Work Practices Survey Project Report 2* (Nov. 2006) (*NAHB Report*) (emphasis added).

In light of these studies, an ample basis exists in the record for concluding that most RRP activities do not create lead-based paint hazards, but rather minimize and even eliminate such hazards. As discussed above, the statute limits EPA’s regulatory authority to those activities that actually create a lead-based paint hazard, which means that RRP activities would generally be exempt from EPA’s authority under Section 402(c)(3). To the extent that EPA is without authority to promulgate enforceable regulations with respect to such activities, it is likewise prohibited from requiring renovators engaged in RRP activities to conduct dust wipe testing or clearance testing.

C. EPA has not satisfied the requirement to conduct a study to determine which types of renovation activities create lead-based paint hazards because the studies the Agency conducted are flawed

EPA also is without authority to promulgate dust wipe testing or clearance testing requirements for RRP activities because the Agency has not satisfied the prerequisite of conducting a congressionally-mandated study as set forth under the relevant statute for

imposing regulatory requirements on RRP activities. Prior to promulgating any regulations involving RRP activities, EPA was required to conduct a “Study of certification” to determine which of the “various types of renovation and remodeling activities . . . disturb lead and create a lead-based paint hazard on a regular or occasional basis.” 15 U.S.C. § 2682(c)(2). Thus, EPA cannot promulgate any regulations affecting RRP activities until after it has satisfied the “Study of certification” requirements.

The Agency has undertaken a four-part study (Study) in an attempt to satisfy the study requirement, but the administrative record provides an ample basis for questioning the validity of the Study and its conclusions. One of the most comprehensive critiques of the Study comes from the Mercatus Center at George Mason University, which conducted a “careful and independent analys[is] employing contemporary economic scholarship to assess [the] rulemaking proposal[] from the perspective of the public interest.” *Mercatus Report* at 1. According to the Mercatus Report, the conclusions made in EPA’s Study did not match its content. *Id.* at 23. For example, based on a review of EPA’s own data, the *Mercatus Report* concluded that:

- Phases I and II of the Study “failed to find a connection between elevated blood-lead levels and workers’ exposure to considerable amounts of lead-contaminated dust;” and
- “[T]he Wisconsin [Phase III] study cannot claim that any RRP work increases the risk of elevated blood-lead levels in children.”

Id. at 10, 21; *see also* NAHB LRRP Rule Comments, Section II(B)(4).

Several members of the peer review panel involved in evaluating the Study also raised concerns about various aspects of the methodologies employed. For example, EPA reported that “[i]n regard to the Wisconsin blood-lead registry, another issue of concern among the reviewers was how representative the registry is of the state population.” *See* Phase IV Report at 1.3. However, the Study failed to adequately address these and other concerns. In other words, contrary to EPA’s conclusions, the Agency’s own Study failed to show that unregulated RRP activity contributed to increased blood-lead levels in *either* RRP workers or in children residing in homes that were being remodeled. NAHB likewise pointed out in its prior comments to EPA that “the studies cited do not illustrate a definitive link between renovation and remodeling activities and lead poisoning in children.” *See* NAHB LRRP Rule Comments, Section II(B).

EPA has based its decision to regulate RRP activities on the conclusions made in the Study, when the underlying data suggest that there is little, if any, need for such regulation. Because the conclusions of the Study are not supported by the underlying data, EPA has not satisfied the requirements of Section 402(c)(2) because it has not adequately determined the “extent to which persons engaged in various types of renovation and remodeling activities . . . are exposed to lead in the conduct of such activities or disturb lead and create a lead-based paint hazard” as required by Congress. 15 U.S.C. § 2682(c)(2). Therefore, EPA is not entitled to “utilize the results of the study” as a justification for promulgating dust wipe testing and clearance testing requirements for RRP activities. 15 U.S.C. § 2682(c)(3).

II. EPA's Proposed Requirements Are Inconsistent With the Statute Because They Eliminate the Distinction Between Abatement and Renovation

The imposition of dust wipe testing and clearance testing requirements as proposed by EPA is inconsistent with the intent of Congress because at a fundamental level it eliminates the distinction between abatement contractors on the one hand and renovators on the other. "Abatement is intrinsically very different from remodeling," and this reality is reflected in the statute, which sets forth separate regulatory schemes for "lead-based paint activities," including abatement, and renovation and remodeling. NAHB LRRP Rule Comments at 23 (May 25, 2006). Moreover, those regulatory schemes differ in key respects. For example, Section 402(a) requires that *all* abatement contractors be properly trained and certified and that *all* abatement activities conform to work practice standards promulgated by the Agency. In contrast, Congress gave EPA flexibility in determining whether contractors engaged in RRP activities should be subject to regulatory requirements.

The legislative history of Title X supports the conclusion that Congress believed RRP activities and lead-based paint activities were distinct and that each required a different level of government regulation. For example, the Senate Committee on Banking, Housing and Urban Affairs recognized that not all RRP activities would create lead-based paint hazards and that, unlike lead-based paint activities (risk assessment, inspection, abatement), not all RRP activities would require the use of certified workers. As the Committee stated:

Although the committee is aware that some home remodeling and renovation projects which have not incorporated lead reduction measures have aggravated lead-based paint hazards, and caused poisoning of workers and children, *not all such projects are inherently dangerous*. The level of hazards is a function of the extent to which lead-based paint is disturbed and the amount of dust lead generated. *The committee recognizes that some federally funded renovation projects in housing containing lead-based paint will not require certified workers* because it will not involve significant dust generation or the disturbance of painted surfaces.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

In fact, many RRP activities are more closely related to a category of activities referred to as "Interim Controls" in the bill before the Committee (which included "repairs, maintenance, [and] painting") than they are to abatement and other lead-based paint activities. "Interim Controls would be measures which temporarily reduce human exposure or likely exposure to lead-based paint hazards. These measures would include specialized cleaning, repairs, maintenance, painting, temporary containment, ongoing monitoring of lead-based paint hazards or potential hazards, and the establishment and operation of management and resident education programs." *Id.* at 115. In the bill it reported out, the Committee chose not to impose any training and certification requirements on individuals carrying out interim control measures, stating that:

These activities typically involve *less* potential for generating dangerous levels of dust, and are not much

different from the types of activities routinely carried out by housing residents and maintenance personnel.

S. Rep. No. 102-332 at 121 (1992) (emphasis added).

EPA itself has recognized that abatement activities and renovation differ in fundamental respects. In issuing the LRRP Rule, the Agency acknowledged that “[t]he purpose of an abatement project is to permanently eliminate lead-based paint and lead-based paint hazards.” 71 Fed. Reg. at 1613. As a consequence, EPA concluded, it is “perfectly appropriate” to require an abatement contractor to undertake testing once the work is completed to ensure that the lead-based paint hazards have in fact been eliminated. *Id.* In contrast, EPA recognized that “renovations may be performed for many reasons, most of which have nothing to do with eliminating lead-based paint hazards.” *Id.* at 1613-14. The Agency further recognized that “if clearance testing using dust wipes were required after every renovation job, it could have the effect of holding the renovation firm responsible for abating all lead dust hazards, including such hazards that may have existed in the area before the renovation commenced.” *Id.* at 1614.

To the extent that EPA imposes clearance testing requirements, the Agency will effectively eliminate any distinction between renovation and abatement. *Id.* at 250050 (“EPA is proposing to require renovation firms to follow a clearance process similar to that performed after abatement projects . . .”). Indeed, the amended Rule would impose more requirements on renovators, who have to follow specified cleaning requirements, than contractors performing abatement projects. Even the dust wipe testing requirements in the amended Rule impermissibly blur the distinction between abatement and renovation. For instance, dust wipe testing will effectively make renovators responsible for any lead dust left in the residence after the job that is in excess of applicable standards unless the renovators incur the additional costs associated with baseline testing. Consequently, whether the task carried out is one of renovation or abatement, the company performing the work must meet the cleanliness standards regardless of conditions that existed prior to the commencement of the work.

Accordingly, notwithstanding the fundamental distinction between abatement and renovation, the imposition of dust wipe testing and clearance testing requirements imposes essentially the same burden on the renovator as the abatement contractor, *i.e.*, to leave the work area in a clean, relatively dust-free (and therefore lead dust-free) condition. In the case of abatement contractors, remedying pre-existing conditions and rendering the work area free of lead is precisely the point of the work. However, the purpose of a renovation project is to change the appearance of the home in some fashion without regard to the presence of lead, and it is therefore inappropriate to impose liability on renovators for failing to remedy pre-existing conditions. Thus, the imposition of dust wipe test and clearance testing requirements would erode the distinction between abatement contractors and renovators in critical respects, which is contrary to the intent of Congress to maintain the distinction between the two types of contractors.

III. EPA's Proposed Imposition of Dust Wipe Testing and Clearance Requirements is Arbitrary and Capricious

Even if EPA has authority under the statute to impose clearance testing and other requirements on renovators, the Agency's rulemaking can be judicially overturned if a court determines that the rule is arbitrary and capricious. As the U.S. Supreme Court has stated, an agency's decision will be vacated if it 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007). Moreover, EPA must articulate an explanation that includes "a rational connection between the facts found and the choice made." *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 952 (D.C. Cir. 2007). A court should uphold EPA's action only if the court can discern a "reasoned path" from the facts and considerations before the Agency to the decision it reached. *United Distribution Cos. v. F.E.R.C.*, 88 F.3d 1105, 1187 (D.C. Cir. 1996) (*per curiam*). Accordingly, if EPA has offered an explanation for its decision that runs counter to the evidence before it, the court should find the Agency's action to be arbitrary and capricious. *American Coke & Coal Chemicals Inst. v. Environmental Protection Agency*, 452 F.3d 930, 941 (D.C. Cir. 2006). Here, EPA's explanation for its rulemaking decisions run counter to the evidence in the record that was before the Agency.

A. The Agency has simply changed its mind without citing any new data or circumstances to justify its new direction

When changing a final rule, an agency must provide a reasoned explanation for the change. *See C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1561 (D.C. Cir. 1991); *see also Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) (stating that an agency may change its past practices, especially under changed circumstances, so long as it provides a reasoned explanation for its action). If an agency fails to explain its reassessment, then the courts will decline to find that the agency had an adequate basis for its decision. *Fox*, 931 F.2d at 1561. In amending the Rule to include dust wipe testing and clearance testing requirements, EPA has reversed course without citing any data or other information that has come to light since April 2008 that casts doubt on its prior position. *See* 75 Fed. Reg. at 25057 (References). Rather, it appears that the Agency simply changed its mind even before it implemented the Rule as the result of the settlement of a lawsuit. *See* 75 Fed. Reg. at 25044. In the absence of a reasoned explanation for the change in the Rule regarding dust wipe testing and clearance testing, the Agency's decision is arbitrary and capricious.

B. The Agency notes the concerns which led it to reject dust wipe testing and clearance requirements for renovation activities (cost, liability concerns) but fails entirely to explain how its new proposal is justified in the face of those same concerns

EPA gave "significant weight to the cost . . . and liability concerns" in crafting the Rule. *See* 75 Fed. Reg. at 25046. In proposing to amend the Rule, EPA concedes that the imposition of dust wipe testing and clearance testing will make renovation and remodeling

activities more expensive. *See* 75 Fed. Reg. at 25044 (“EPA also recognized that dust wipe testing and clearance as required after abatements can be expensive.”). Further, the Agency acknowledges that the amendments will prompt renovation and remodeling contractors to take measures to protect themselves against future liability. *Id.* at 25045 (noting that EPA considered the “white glove” method an alternative to clearance in order to protect contractors against liability for pre-renovation dust). However, EPA has not adequately explained why it reached a different conclusion on dust wipe testing and clearance testing when the factors to be balanced remained unchanged. *See id.* at 25046. (“EPA has continued to balance these considerations in today’s proposal, but has preliminarily concluded that, for certain jobs, the additional benefits of dust wipe testing, and in some cases clearance, warrant imposing these additional requirements.”). Such a course of action is arbitrary and capricious.

C. The proposed rule will actually undermine EPA’s goal of minimizing risk to young children and other exposed populations

The dust wipe testing and clearance testing requirement will actually undermine the very goal that EPA seeks to achieve, *i.e.*, overall reduction of lead-based paint hazards. As renovators incur the costs associated with dust wipe testing and clearance testing, they will pass some of those costs along to their customers in the form of higher prices for services. NAHB’s survey demonstrates that most homeowners are unwilling to absorb significant costs for dust wipe testing and clearance testing. NAHB, *Report on Lead Paint Test Survey* (April 2007). As a result of the higher prices occasioned by dust wipe testing and clearance testing, some homeowners may elect to postpone renovations, meaning that areas with lead-based paint will remain in homes longer. In other cases homeowners – who will not be subject to EPA’s regulatory requirements – will undertake such activities on their own, or will hire underground and/or unregulated contractors. In either case, the work may be done in a way that causes more lead dust and cleanups may not be as thorough.

As noted by NAHB, the Mercatus Center, and others, the unintended consequence of the imposition of dust wipe testing and clearance testing requirements on professional renovators will be that more children and other people will be placed at risk for lead poisoning due to deteriorating homes. *See* NAHB LRRP Rule Comments at Section II(C)(2); *see also* *Mercatus Report* at 30. As the U.S. Court of Appeals for the Seventh Circuit has stated, a court “is not obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that . . . frustrate the congressional policy underlying a statute.” *Local 15 Int’l Brotherhood of Elec. Workers, AFL-CIO v. N.L.R.B.*, 429 F.3d 651, 656 (7th Cir. 2005). Thus, it would be arbitrary and capricious for EPA to impose requirements that will lead to an increased risk to the very population EPA is striving to protect.

IV. EPA’s Refusal to Convene a New Small Business Advocacy Review Panel Violates the Regulatory Flexibility Act

In the preamble of the proposed LRRP Rule Amendment, EPA states that it has complied with its obligation under the Regulatory Flexibility Act (RFA), including its responsibility to convene a Small Business Advocacy Review (SBAR) Panel. More specifically, EPA alleges that the SBAR Panel which was convened in 1999, and discussed in the preamble to the original LRRP Rule, satisfies any obligation the Agency might have

to convene a SBAR Panel as a consequence of proposing the LRRP Rule Amendment. EPA is mistaken in this assumption.

EPA must convene a SBAR Panel any time “a rule is promulgated which will have a significant economic impact on a substantial number of small entities.” 5 U.S.C. § 609(a). EPA’s obligation to convene a SBAR Panel is not limited to situations in which an entirely new rule is being proposed. Instead, this obligation is triggered by any rulemaking – even the amendment of an existing rule – that would result in a significant economic impact on a substantial number of small entities. For example, EPA convened a SBAR Panel to review proposed changes to existing regulations related to the certification of pesticide applicators. *See EPA, Panel 33b: Certification of Pesticide Applicators (Revisions)*.

By adding dust wipe testing and clearance testing requirements, the proposed LRRP Rule amendments would significantly alter the regulatory reach – and consequently the economic impact – of the LRRP Rule. EPA itself has recognized that the changes associated with the proposed amendments would result in a significant economic impact on a substantial number of small entities. *See 75 Fed. Reg. at 25061*. For example, according to EPA’s economic analysis related to the proposed LRRP Rule amendments, the additional requirements would cost small entities between 0.4% and 2.6% of their annual revenue. *Id.* Therefore, it is apparent that the proposed amendments trigger EPA’s obligation to undertake a RFA/SBREFEA Screening Analysis and ultimately convene a new SBAR Panel.

EPA attempts to avoid this obligation under the RFA by stating that it “believes that the conclusions it made in 2008 regarding these recommendations are applicable to this proposal.” *Id.* Despite these claims, the proposed amendments to the LRRP Rule represent a major departure from the original LRRP Rule and would result in a significant economic impact on a substantial number of small entities. As such, the proposed amendments trigger EPA’s obligations to comply with the RFA, including an obligation to convene a SBAR Panel. To date EPA has failed to discharge this duty. As a result, EPA must delay the promulgation of the proposed amendments until after these obligations have been fully satisfied.

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For the above reasons, ABC believes that the proposed amendments to the Rule regarding dust wipe testing and clearance testing suffer from serious legal deficiencies and should be reconsidered by the Agency. Thank you for the opportunity to submit comments in this matter.

Respectfully submitted,



Sean Thurman
Manager, Regulatory Affairs