

# BAKER BOTTS LLP

THE WARNER  
1299 PENNSYLVANIA AVE., NW  
WASHINGTON, D.C.  
20004-2400

TEL +1 202.639.7700  
FAX +1 202.639.7890  
www.bakerbotts.com

ABU DHABI  
AUSTIN  
BEIJING  
DALLAS  
DUBAI  
HONG KONG  
HOUSTON  
LONDON  
MOSCOW  
NEW YORK  
PALO ALTO  
RIYADH  
**WASHINGTON**

July 6, 2010

Document Control Office (7407M)  
Office of Pollution Prevention and Toxics (OPPT)  
Environmental Protection Agency  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460-0001

Thomas C. Jackson  
TEL +1 202.639.7710  
FAX +1202.585.1009  
thomas.jackson@bakerbotts.com



Re: Docket ID No. EPA-HQ-OPPT-2010-0173 Comments

Dear Sir or Madam:

These comments are submitted in response to the Advance Notice of Proposed Rulemaking issued by the U.S. Environmental Protection Agency ("EPA") concerning the Renovation, Repair and Painting Program for Commercial and Public Buildings on May 6, 2010. The comments are submitted by a coalition of associations involved in various aspects of commercial real estate, development, and contracting. The coalition members include the following: The Real Estate Roundtable; Associated Builders and Contractors; Associated General Contractors of America; Building Owners and Managers Association International; CCIM Institute; International Council of Shopping Centers; Institute of Real Estate Management; NAIOP, the Commercial Real Estate Development Association; National Association of Home Builders; National Association of Real Estate Investment Trusts; National Association of REALTORS®; National Lumber & Building Material Dealers Association; Painting & Decorating Contractors of America; Plumbing-Heating-Cooling Contractors-National Association; and Window and Door Manufacturers Association (the "Coalition").

The Coalition appreciates the opportunity to submit these comments. The Coalition members look forward to working with the Agency as it moves forward with its rulemaking process for RRP activities in public and commercial buildings.

Sincerely,

  
Thomas C. Jackson 

TCJ:  
Enclosure

**Comments Regarding EPA Advanced Notice of Proposed Rulemaking**

**Lead; Renovation, Repair, and Painting Program for Commercial and Public Buildings**

**75 Fed. Reg. 24848 (May 6, 2010)**

**INTRODUCTION**

These comments respond to the Advance Notice of Proposed Rulemaking issued by the U.S. Environmental Protection Agency (“EPA”) concerning the Renovation, Repair and Painting Program for Commercial and Public Buildings. 75 Fed. Reg. 24848 (May 6, 2010) (the “ANPRM”). The comments are submitted by a coalition of associations involved in various aspects of commercial real estate, development, and contracting. The coalition members include the following: The Real Estate Roundtable; Associated Builders and Contractors; Associated General Contractors of America; Building Owners and Managers Association International; CCIM Institute; International Council of Shopping Centers; Institute of Real Estate Management; NAIOP, the Commercial Real Estate Development Association; National Association of Home Builders; National Association of Real Estate Investment Trusts; National Association of REALTORS®; National Lumber & Building Material Dealers Association; Painting & Decorating Contractors of America; Plumbing-Heating-Cooling Contractors-National Association; and Window and Door Manufacturers Association (the “Coalition”).

The Coalition represents the members of the regulated community that will be most affected by any regulations that might be adopted by EPA with respect to renovation, repair and painting (“RRP”) activities for commercial buildings. Accordingly, the Coalition members have a substantial interest in the development of these regulations and can offer important insights regarding the commercial real estate and development industries and the potential impacts of any rules that EPA might consider. The Coalition believes that the Agency should proceed carefully in developing any regulations in this area and should consider a variety of issues.

As discussed further below, the Coalition believes that EPA must consider the scope of its authority before proceeding with any regulations. The Toxic Substances Control Act limits the Agency’s authority to promulgate regulations that govern RRP activities in commercial and public buildings. Among other things, EPA must complete a congressionally-mandated study of RRP activities in commercial and public buildings and the extent to which they create lead-based paint hazards before it can proceed with any regulations.

In addition, EPA must consider a variety of factors in any rulemaking efforts related to RRP activities in commercial and public buildings. For example, the Agency should take into account the fact that RRP activities in commercial and public buildings may present very different patterns of exposure to lead-based paint hazards than the RRP activities in residential settings on which the Agency has previously focused. In addition, EPA should take into consideration the very limited use of lead-based paint in commercial buildings since 1978. EPA must also consider the potential impacts that the imposition of regulatory requirements may have on other national priorities such as increasing energy efficiency. Indeed, the many questions concerning the extent to which RRP activities in commercial and public buildings actually

present lead-based paint hazards and the potential consequences of any regulations strongly suggest that the Agency should continue to seek the input of key stakeholders such as the Coalition's members as this rulemaking proceeds.

## **BACKGROUND**

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"); as part of that subchapter Congress 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," commercial buildings, and public buildings constructed before 1978. 15 U.S.C. § 2682. ("Target housing" is defined 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).)

Title X obligates EPA to promulgate guidelines for renovation or remodeling activities in target housing, commercial buildings, and public buildings constructed before 1978 that create lead-based paint hazards. To that end, EPA adopted the Renovation, Repair and Painting Rule regulating target housing and certain child-occupied facilities in April 2008. 73 Fed. Reg. 21692 (April 22, 2008) (the "Residential RRP Rule"). The work practice requirements announced in the Residential RRP Rule apply to enterprises engaging in RRP activities in target housing and child-occupied facilities but do not apply to homeowners who conduct RRP activities themselves. *Id.* at 21702. The Residential RRP Rule does not apply to other commercial or public buildings. 75 Fed. Reg. 24851 (May 6, 2010).

After the publication of the Residential RRP Rule, EPA entered into an agreement as part of a litigation settlement with various environmental advocacy groups to address concerns regarding the Residential RRP Rule. *Id.* at 24851. As part of this agreement, EPA committed to commence a rulemaking to address RRP activities in commercial and public buildings. *Id.* Accordingly, EPA published the ANPRM on May 6, 2010. *Id.* at 24848.

In the ANPRM, EPA has requested comments on a variety of issues specific to the regulation of RRP activities in commercial and public buildings. The Coalition submits the following comments regarding the ANPRM. We urge EPA to conduct a comprehensive study regarding RRP activities in commercial and public buildings prior to taking any further regulatory action.

### **I. EPA Has Limited Authority to Impose Requirements on RRP Activities in Commercial and Public Buildings**

There are several grounds on which the rules contemplated in the ANPRM would exceed the statutory authority Congress granted to EPA under Title X. First, the statute gives EPA the authority to issue *guidelines* for work practice standards applicable to RRP activities but does not grant the Agency the authority to impose regulatory *requirements* concerning work practices. In addition, on its face Title X provides that EPA can only regulate RRP activities if they are shown

to create lead-based paint hazards. Finally, the Agency cannot promulgate any regulations governing RRP activities in commercial and public buildings until it completes the type of study mandated by Congress. Each of these issues is discussed further below.

**A. EPA Lacks Statutory Authority to Adopt Requirements for RRP Activities in Commercial and Public Buildings and Can Only Issue Guidelines**

Based on the statute's text, EPA lacks authority under TSCA to promulgate regulations governing RRP activities because such requirements would almost certainly be part of work practice standards, which can only be the subject of Agency guidelines. The plain language of TSCA Section 402(a)(1) authorizes EPA "to ensure that 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). The statute also grants EPA the authority to create standards for "lead-based paint activities," which are defined in the context of commercial buildings, public buildings constructed before 1978, bridges and other structures to include "identification of lead-based paint and materials containing lead-based paint, deleading, removal of lead from bridges, and demolition." 15 U.S.C. § 2682(b)(1). Work involving renovation, repair and painting is not included under the "lead-based paint activities" definition.

In enacting Section 402(c), Congress was careful to distinguish between lead-based paint activities and RRP activities – and that section does not authorize EPA to promulgate regulations affecting the work practice standards for RRP in commercial and public buildings. Instead, EPA is authorized 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). Although the statute also requires EPA, after undertaking a study, to revise the regulations developed for abatement and other lead-based paint activities to apply to RRP activities, Congress intended that EPA would apply the appropriate certification requirements developed in connection with lead-based paint activities to RRP contractors but that work practice standards would remain the subject of guidelines, not regulations. 15 U.S.C. § 2682(c)(3). *See, e.g., Spears v. U.S.*, 129 S. Ct. 840, 842 (2009) ("[T]he cocaine Guidelines, like all other Guidelines, are advisory only." (emphasis added)), (quoting *Kimbrough v. U.S.*, 128 S. Ct. 558, 560 (2007)); *Brock v. Cathedral Bluffs Shale Oil Co., et al.*, 796 F.2d 533, 537 (D.C. Cir. 1986) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent proceedings....A properly adopted substantive rule establishes a standard of conduct which has the force of law....A general statement of policy, on the other hand, does not establish a "binding norm.""), (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

This plain reading 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. Any attempt by EPA to require contractors to comply with work practice standards in public and commercial buildings is beyond EPA's statutory authority.

Based on EPA's statements in the ANPRM, it appears that the Agency is considering implementing regulations similar to the Residential RRP Rule at least for external RRP activities at commercial and public buildings. *See* 75 Fed. Reg. at 24855. Under its statutory authority, EPA can only issue such standards as guidelines and not regulatory requirements.

**B. EPA Lacks Authority to Regulate Activities Unless Those Activities Disturb Lead and Create a Lead-Based Paint Hazard**

The regulations contemplated in the ANPRM also exceed EPA's statutory authority because EPA has not established that the RRP activities it seeks to regulate in commercial and public buildings create any lead-based paint hazards. TSCA 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 disturb lead but do not create a lead-based paint hazard. 15 U.S.C. § 2682(c)(3). 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).

In order to regulate RRP activities in commercial and public buildings, EPA would need to show that such activities create a lead-based paint hazard. Without more information than it currently has regarding RRP activities specifically in the commercial and public settings, EPA cannot show that such activities create a lead-based paint hazard. Indeed, EPA acknowledges in the ANPRM that it does not have enough information to conclude that specific RRP activities in commercial and public buildings create a lead-based paint hazard. *See* 75 Fed. Reg. at 24857 and 24859.

Based on statements in the ANPRM, EPA apparently plans to draw upon the findings it made in the Residential RRP Rule to determine that a lead-based paint hazard is also created by RRP activity in commercial and public buildings. *See* 75 Fed. Reg. at 24856 and 24858 ("EPA requests comment on the extent to which [the "Characterization of Dust Lead Levels After Renovation, Repair, and Painting Activities" (the "Dust Study") and the Phase I, Environmental Field Sampling Study (the "Phase I Study")] should inform EPA's determination on lead-based paint hazards created by renovations on the interiors of non-residential buildings.") This reliance, however, is misplaced. There is a lack of evidence to support a conclusion that, even in a residential setting, all RRP activities that disturb lead-based paint create a lead-based paint hazard. Nor is there a reasonable basis for EPA to extrapolate from either the Dust Study or the Phase I Study - both of which were conducted mostly in residential settings - to determine that renovations in commercial and public buildings create lead-based paint hazards.

In any event, as a general matter, most RRP activities either eliminate or reduce the potential for future lead-based paint hazards. For example, the Mercatus Report found 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 reach similar conclusions. A study conducted by the National Association of Home Builders (“NAHB”) explained 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) (the “*NAHB Report*”) (emphasis added). Moreover, the Wisconsin Department of Health and Family Services noted that “our experience in Wisconsin is that *professional renovation is rarely the cause of lead poisoning in children.*” Wisconsin Department of Health and Family Services, *Comments: Lead; Renovation, Repair, and Painting Program; Proposed Rule* (emphasis added).

In light of these studies, an ample basis exists in the record to conclude 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).

Without additional information, such as a study examining different forms of RRP activities exclusively in the context of commercial and public buildings, EPA cannot conclude that any specific RRP activities create a lead-based paint hazard. Furthermore, to the extent that EPA intends to rely on the Dust Study, the Phase I Study, or some other existing study to provide evidence of a lead-based paint hazard created by RRP activities in commercial and public buildings, the evidence does not support such a conclusion.

Moreover, before it can move forward EPA must address the fact that it currently cannot determine whether any RRP activities in commercial and public buildings create lead-paint hazards because it has not yet adopted standards for determining the presence of lead-based paint hazards in commercial and public buildings. The lead-based paint hazard regulations previously adopted by the Agency apply only to target housing and child-occupied facilities. See 40 C.F.R. § 745.65. Those standards are based on risks of exposure to young children. EPA has no rational basis to conclude that residential standards that apply where young children may have only minimal exposure are pertinent to commercial settings where young children are not routinely present.

**C. EPA Cannot Adopt Regulations Until It Completes the Statute’s “Study of Certification” Requirements**

In addition to these fundamental limits on its rulemaking activity, and assuming *arguendo* that EPA has authority to issue regulations for RRP activities in commercial and public buildings, any such regulations would be premature because EPA has not satisfied the

prerequisite of conducting a congressionally-mandated study regarding RRP activities. Prior to promulgating any regulations involving RRP activities, EPA is 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. This statutory requirement to conduct a certification study explicitly applies to commercial buildings and public buildings (constructed before 1978). 15 U.S.C. § 2682(c)(2).

EPA has not conducted a study that focuses on RRP activities in commercial buildings and public buildings constructed before 1978, and the potential of such activities to create lead-based paint hazards. EPA has requested comments in the ANPRM regarding the extent on which it should rely on previous studies it has conducted regarding lead-based paint in residential settings. 75 Fed. Reg. at 24856 and 24858. These studies include the 2007 Dust Study and the four-part study conducted by EPA between 1997 and 1999 (the “Study”). EPA cannot rely on such studies as these did not focus on RRP activities in commercial buildings and public buildings constructed before 1978. Although the Dust Study may have included information on renovations at a school building frequently occupied by children, this is too limited of a data set from which to draw any conclusions regarding RRP activities generally in public and commercial buildings. 75 Fed. Reg. at 24856. Until it conducts a study that actually focuses on RRP activities in commercial and public buildings, it is premature for EPA to contemplate any regulations as it does not have the statutory authority to take the type of regulatory action it appears to be contemplating.

Not only do the studies previously conducted by EPA involve irrelevant subject matter, but, as discussed previously, serious doubts exist regarding the methodologies used and the conclusions of the studies. 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 the 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.

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.

These concerns regarding the accuracy of the conclusions drawn in EPA's previous studies underscore the need for EPA to conduct a comprehensive study of RRP activities in commercial and public buildings before it seeks to regulate such activities. However, even if there were no doubts regarding the previous studies, EPA cannot promulgate any regulations affecting RRP activities in commercial and public buildings until after it has satisfied the statutory requirement to conduct a study of these specific activities.

## **II. Policy Considerations Related to EPA's Intention to Propose Regulations for RRP Activities in Commercial and Public Buildings**

### **A. EPA Must Consider a Number of Factors in Developing Potential Regulatory Requirements for RRP Activities in Commercial and Public Buildings**

As EPA has acknowledged in the ANPRM by its numerous requests for public comments on a wide range of issues related to RRP activities in commercial and public buildings, there are numerous factors the Agency must consider prior to proposing any regulatory requirements for such activities. These factors range from determining how to develop standards that protect different population groups with different exposure risks to avoiding conflicts with pre-existing regulatory programs already in place. We highlight below a few of the key factors that EPA must consider in any rulemaking process for RRP activities in commercial and public buildings.

#### **1. Issues Presented by Different Sub-Populations**

Any lead-based paint hazard standards developed by EPA to govern RRP activities in commercial and public buildings must take into account the potential exposure of different sub-populations to lead-based paint in such settings. These exposure patterns are likely very different from the exposure patterns EPA has previously encountered in target housing and child-occupied facilities. Furthermore, these exposure patterns are likely to vary greatly between different types of commercial and public buildings. For example, one might expect to find young children or pregnant women at a "big-box" commercial retail establishment more frequently than at a manufacturing facility located in an industrial area.

EPA has acknowledged that it does not have the information it needs to understand the exposure risks to different sub-populations. The ANPRM states that although EPA "has developed research-based daily activity patterns for general use in its analyses for children and adults, none of the patterns distinguish activities based on the character or ownership of the buildings where activities occur." 75 Fed. Reg. at 24860. This is exactly the type of information EPA must have before it can attempt to develop regulations governing such settings. Without an understanding of the sub-populations likely to be exposed to lead-based paint in any particular building, EPA cannot determine whether a RRP activity presents a lead-based paint hazard. As discussed previously, EPA lacks authority to regulate RRP activities unless they create a lead-based paint hazard.



Any lead-based paint hazard standards must not only allow for a wide variety in exposure patterns of different sub-populations, they must also account for the different vulnerability levels to the dangers of lead-based paint between such sub-populations. Unless EPA can establish that a single set of lead-based paint hazard standards should apply to protect both young children as well as older children and adults, the Agency will need to consider adopting different work practice standards for commercial buildings, such as office buildings or industrial facilities, where young children are expected to be found only infrequently (if at all). Although the ANPRM states it “does not believe that options considered in this rulemaking should be limited to those buildings or situations where young children are likely to be exposed,” EPA also acknowledges that it “continues to believe that it is important to emphasize the deleterious effects of lead exposure on young children, a sub-population that has long been identified as being particularly susceptible to the adverse effects of lead. 75 Fed. Reg. at 24855. Because EPA does not appear to have information suggesting that all RRP activities present the same hazards to all population groups, EPA must determine how to structure any standards to address such differing risks.

In order to better understand both the likelihood of exposure of different sub-populations at specific commercial and public locations, and the need to protect the most vulnerable groups differently from those least susceptible to lead-based paint hazards, EPA should conduct a comprehensive study analyzing RRP activities in different commercial and public buildings. Without this information, it will be impossible for the Agency to craft rational standards to address any potential lead-based paint hazards.

## 2. Presence of Lead-Based Paint

In evaluating the need for lead-based paint standards in commercial and public buildings, EPA also must consider the fact that, although the use of lead-based paint was not completely banned in all industrial and commercial buildings, the use of such paints has been dramatically limited since the 1978 restriction on the use of lead-based paint in interior and exterior surfaces in housing and other buildings and structures used by consumers. *See* 75 Fed. Reg. at 24856. Industry practice has been to restrict the use of lead-based paints in all but the most industrial of uses dating back to the 1970s. EPA acknowledges that the prevalence of lead-based paint in commercial and public buildings is an important factor in determining whether RRP activities create lead-based paint hazards. 75 Fed. Reg. at 24858. In drafting the 2008 Residential RRP Rule, EPA had access to two national studies evaluating the prevalence of lead-based paint in target housing and daycare centers. *See* 75 Fed. Reg. at 24858. EPA, however, does not have similar information on the prevalence of lead-based paint in commercial and public buildings.

This lack of information in yet another area crucial to EPA’s deliberations again highlights the need for EPA to conduct a comprehensive study of the issues related to lead-based paint in public and commercial buildings. Without such a study, it is impossible for EPA to determine how the reduced amount of lead-based paint in use at commercial and public buildings affects whether RRP activities in such settings create hazards. For example, it may be appropriate to limit the applicability of any work practice standards for RRP activities in commercial buildings to commercial structures that were built before 1978 (as Congress has done with target housing and public buildings). Alternatively, EPA may determine that any

application of work practice requirements to RRP activities in commercial buildings built after 1978 should be limited to the types of post-1978 commercial buildings where lead-based paint is more likely to be found, such as industrial facilities as opposed to office buildings or retail facilities.

Moreover, EPA should consider the areas within commercial and public buildings that may be more likely to have lead-based paint and the potential implications of the patterns for human exposure. For example, in office and retail settings the areas occupied by tenants are often renovated when there is a changeover in tenants. As a result, today the areas occupied by tenants are less likely to have any lead-based paint even if the building was constructed prior to 1978. Areas that may be more likely to have some lead-based paint are the “core areas” where the exposure of any individual would be very limited. Therefore renovations in tenant-occupied areas in at least some types of commercial buildings may not require significant regulation because the likelihood that lead-based paint is present is very low. These are the types of issues that EPA must consider carefully in any rulemaking process.

### 3. Consideration of Different Types of RRP Activities

Similarly, EPA must consider the potentially significant differences between various types of RRP activities that may be conducted in commercial buildings. For example, in office buildings, retail facilities and other types of commercial buildings it is common for RRP activities to be undertaken in connection with a change of occupants, such as when a new business leases a commercial space. However, during these types of renovations the only individuals who would be present in the space being renovated would be the workers undertaking the renovation, who would be subject to existing Occupational Safety and Health Administration (“OSHA”) regulations. It may be appropriate to establish standards for such renovations that are different from the standards that might apply in connection with renovations in an occupied building or to exempt such renovations from work practice requirements entirely. EPA must explore the differences in exposure to lead-based paint hazards that may be associated with different types of RRP activities in commercial buildings.

Furthermore, EPA must understand that routine maintenance is an on-going daily practice for commercial buildings. Any study EPA undertakes must examine and distinguish between ordinary operations and maintenance activities, and renovation and remodeling activities. Otherwise, standards for RRP activities could be triggered on virtually a daily basis, at millions of commercial buildings across this country. Neither regulators, workers, nor building owners and managers could contend with the expense and administrative burdens associated with requirements governing RRP activities if they arise continually in the context of on-going building operations and maintenance.

### 4. Impacts of and on Existing Regulatory Programs

The ANPRM recognizes that extensive OSHA regulations already exist that govern exposure to lead-based paint both in construction activities and general occupational settings. *See* 75 Fed. Reg. at 24858; 29 C.F.R. §§ 1910.1025, 1926.62. The OSHA standards set permissible exposure levels for employees in the workplace. 29 C.F.R. §§ 1910.1025(c),

1926.62(c). It is reasonable to believe that employees are the single largest sub-population that would be affected by exposure to lead-based paint from RRP activities in public and commercial buildings. The ANPRM, however, does not include a discussion of the effectiveness of the OSHA regulations which already address lead-based paint hazards that result from RRP activities in commercial and public buildings. Given the fact that the OSHA regulations may effectively eliminate any lead-based paint hazards, EPA must consider the impacts of the existing OSHA requirements in assessing the need for further guidelines or regulation.

In light of the protections already offered by OSHA regulations to arguably the largest sub-population with the highest levels of exposure to lead-based paint RRP activities in commercial and public buildings, EPA should carefully consider whether it is necessary to impose additional regulations that would serve primarily to create a burdensome two-tiered regulatory structure. Such additional regulations could only be justified by a need to protect the most vulnerable of sub-populations such as young children. However, these sub-populations are generally not encountered in most commercial settings except on a very limited basis and would likely not have enough exposure to RRP activities to benefit from such additional heightened standards.

#### 5. Additional Factors EPA Must Consider

While the issues discussed above highlight the lack of information EPA has regarding RRP activities in commercial and public buildings, they are only a fraction of the unanswered questions related to lead-based paint hazards in these settings. Prior to issuing any regulations related to RRP activities in commercial and public buildings, EPA must consider these issues as well as provide answers to several other questions including the following:

- How should commercial building be defined for purposes of the rule?
- What are the current uses for lead-based paint in commercial buildings? Do the owners or managers of commercial buildings test for the presence of lead-based paint? Under what circumstances?
- What types of renovations are commonly performed in commercial buildings? How frequently are renovations performed in a given building?
- To what extent do routine maintenance activities in commercial buildings involve the disturbance of painted surfaces?
- What steps, if any, are commonly taken in connection with renovations in commercial buildings to restrict access to the area being renovated while the activity is underway?
- What steps, if any, are commonly taken in connection with renovations in commercial buildings to limit the spread of dust beyond the work area?
- How frequently do commercial buildings exist in close proximity to residences?

- How would the imposition of certification, training and work practice requirements affect renovation activities in commercial buildings? How would building owners and managers be affected?

**B. EPA's Lack of Information Highlights the Need for Continuing Stakeholder Involvement**

The ANPRM contains many direct requests for comments regarding a variety of issues related not only to RRP activities in commercial and public buildings, but also to the characteristics of the buildings themselves and, furthermore, to what exactly constitutes a public or commercial building. *See, e.g.*, 75 Fed. Reg. at 24856. The extensive nature of these questions again demonstrates the need for EPA to conduct a comprehensive study examining RRP activities in commercial and public buildings. It also highlights the need for EPA to continue to involve stakeholders in the regulatory process.

The questions posed by EPA in the ANPRM are not only extensive, they are also highly complex and likely to elicit responses which differ dramatically depending on the respondent. For example, the answer to a question such as “how frequently do children under six years of age visit commercial buildings and how long do such visits typically last?” will vary from respondent to respondent and depend on a wide variety of contributing factors such as what type of party is using the space. The complexity of these issues also strongly suggests the need for continuing stakeholder involvement in EPA’s rule development process.

In addition to a need for continuing stakeholder involvement in the development of any eventual regulations, EPA will need to convene a Small Business Advocacy Review Panel (“SBAR”) consistent with the requirements of the Regulatory Flexibility Act (“RFA”) and should do so early in the process. Under the RFA, 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). This obligation is triggered by any rulemaking that would result in a significant economic impact on a substantial number of small entities. The regulations contemplated in the ANPRM have the potential to have a significant impact on every small business (as well as every medium and large business) in the country. Accordingly, EPA should initiate planning now for the required SBAR Panel.

**C. Regulation of RRP Activities in Commercial and Public Buildings May Conflict With Other National Priorities**

The potential regulatory requirements on RRP activities in commercial and public buildings that the ANPRM announces may drastically affect other national priorities. Perhaps the best example of this potential conflict is the programs and financial incentives to increase energy efficiency in the United States and reduce the country’s dependence on foreign and carbon-based fuel supplies.

According to the Department of Energy, the commercial buildings sector accounts for 46% of total building energy use in the United States. *See* U.S. Energy Information Administration, *Annual Energy Review 2008*, June 26, 2009 at Table 2.1a, *available at*

<http://www.eia.doe.gov/aer/consump.html>. The Pew Center on Climate Change recently reported that lack of funds and financing, especially due to the recession and frozen lending market, is the single greatest impediment for capital investments in energy efficiency. *New Pew Center Report Documents Best Practices in Corporate Energy Efficiency*, Mar. 31, 2010, available at <http://www.pewclimate.org/press-release/corporate-energy-efficiency/03-31-10>. In response to such circumstances, there are multiple federal initiatives that are intended to encourage and provide financial incentives for commercial building owners and managers to renovate and remodel their assets to increase energy efficiency. Some examples include:

- President Obama's recent Oval Office address on the BP oil spill in the Gulf of Mexico noted policy proposals for "raising [energy] efficiency standards in our buildings like we did in our cars and trucks." *Obama's First Oval Office Address*, N.Y. Times, June 15, 2010, available at <http://www.nytimes.com/2010/06/16/us/politics/16obama-text.html>. Indeed, the fundamental premise of the White House's "Recovery Through Retrofit" plan is that "[m]aking American homes and buildings more energy efficient presents an unprecedented opportunity for communities throughout the country." Offices of the President and Vice President, Council on Environmental Quality, Middle Class Task Force, *Recovery Through Retrofit*, Oct. 2009, at 1.
- EPA's Energy STAR office has developed established protocols to rate and benchmark efficiency performance of commercial buildings. See [http://www.energystar.gov/index.cfm?c=business.bus\\_index](http://www.energystar.gov/index.cfm?c=business.bus_index).
- The Commercial Building Initiative, an effort of the Building Technologies Program of the U.S. Department of Energy, aims to significantly improve the energy efficiency of new and existing commercial buildings through retrofit projects. See [http://www1.eere.energy.gov/buildings/commercial\\_initiative/](http://www1.eere.energy.gov/buildings/commercial_initiative/).
- A suite of federal, state, and local programs has been developed to provide financial incentives like tax benefits, block grants, and rebates to help building owners and managers underwrite the expense of energy efficiency renovations. A listing of such programs is available at <http://www.dsireusa.org/incentives/index.cfm?state=us&re=0&EE=1>.
- Comprehensive energy and climate proposals introduced in Congress would establish new efficiency requirements for commercial buildings, and also create incentives and financing programs to help the private sector bear the costs of expensive energy renovation projects. See, e.g., S. 1462, American Clean Energy Leadership Act; S. 1733, Clean Energy Jobs and American Power Act; 3464, Practical Energy and Climate Plan Act; S. \_\_\_\_, American Power Act (Kerry-Lieberman discussion draft); H.R. 2454, American Clean Energy and Security Act.
- Numerous other bills pending in Congress propose energy efficiency financing platforms for the commercial buildings sector, ranging from long-term measures

that encourage deep, whole-building retrofits to component-specific incentives to spur upgrades of building envelope, equipment, and materials. *See, e.g.*, S. 949/H.R. 2212, 21<sup>st</sup> Century Energy Deployment Technology Act; S. 1574, Clean Energy for Homes and Buildings Act; S. 1637/H.R. 4226, Expanding Building Efficiency Incentives Act; S. 1743/H.R. 3715, Expanding the Rehabilitation Tax Credit; S. 3079/H.R. 5476, Building STAR Energy Efficiency Act; H.R. 426, Green Roofing Energy Efficiency Tax Act; H.R. 1778, Retrofit for Energy and Environmental Performance Act; H.R. 2615, Energy Efficient Commercial Roofs Act; H.R. 3659, Building Tax Credit Act; H.R. 3836, Private Financing for Clean Energy Technology; H.R. 4155, Property Assessed Clean Energy Tax Benefit Act; H.R. 4296, Mechanical Insulation Incentives Act; H.R. 4455, Expanding Industrial Energy Efficiency Incentives Act.

These examples demonstrate that the Obama Administration, leaders in Congress, and state and local governments have all emphasized that increased energy efficiency in our public and commercial buildings is a compelling public policy objective. Based on the information provided in the ANPRM, EPA has not sufficiently considered how such energy efficiency initiatives will be impacted by contemplated RRP regulations on lead-based paint in commercial and public buildings.

There is a clear relationship between energy efficiency projects and commercial renovation lead-based paint rules. More than 75 percent of buildings that exist in urban areas today will still be standing in 2030, and these are the exact buildings that will benefit the most from energy retrofit projects in terms of reduced and more efficient energy consumption. *See* <http://www.ashrae.org/aboutus/page/2372>. But such building rehabilitations are also the same projects that are likely to trigger the potential exterior and interior RRP rules currently contemplated by EPA. These RRP rules could likely impose regulatory costs that are so high they would nullify any financial incentives offered for energy efficiency projects, and thereby discourage building upgrades designed to lower power consumption, reduce greenhouse gas emissions, and create jobs as part of a new energy economy. If EPA proceeds with the RRP rules contemplated in the ANPRM, the Agency should consider financing programs to offset the costs associated with any lead-based paint regulations on RRP activity where it arises in the context of energy efficiency renovations and remodels.

These impacts on national energy efficiency initiatives demonstrate that EPA must have a clear understanding of the costs and benefits of any RRP regulations before they might be imposed - especially during this time of increased awareness of and focus on nationally significant issues such as curtailing our country's energy use and the rebuilding of the national economy. To gain a better understanding of the issues, EPA should conduct a study focused specifically on RRP activities in commercial and public buildings prior to proposing any regulations.

Given the significant inefficiencies in the country's inventory of existing buildings and infrastructure, the government has focused on retrofitting to improve energy efficiencies. The increased demand for energy efficiency retrofits will provide a much-needed boost for the hard-hit construction industry. Seasonally adjusted construction industry employment slipped in June

2010 to the lowest total in fourteen years (since July 1996); while the industry's unemployment rate remained at 20.1 percent. New regulatory hurdles will only add road-blocks in the construction industry's path to economic recovery and the nation's path towards energy efficiency.

These potential conflicts also highlight the need for early, frequent, and substantive coordination and input from the White House, other EPA divisions, sister agencies, and congressional offices to ensure that potential RRP regulations in commercial and public buildings do not subvert significant national priorities such as energy efficiency initiatives.

### **CONCLUSION**

The Coalition appreciates the opportunity to submit these comments. The Coalition members look forward to working with the Agency as it moves forward with its rulemaking process for RRP activities in public and commercial buildings.