

United States Senate

WASHINGTON, DC 20510

February 13, 2013

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Mr. James Jones
Acting Assistant Administrator
Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1201 Pennsylvania Avenue NW, Room 3130
Washington, DC 20460

Dear Administrator Jackson and Acting Assistant Administrator Jones:

On December 31, 2012, Environmental Protection Agency (EPA) published a notice in the Federal Register (“Notice”) announcing a public hearing on June 26, 2013, and requesting information on renovation, repair, and painting activities on and in public and commercial buildings.¹ EPA is currently in the process of determining whether these activities create lead-based paint hazards and, if any do, the Agency will develop certification, training, and work practice requirements under the Toxic Substances Control Act (TSCA). While we certainly support the goal of reducing lead exposures – particularly to children – we have some concerns with EPA’s process and the possibility for this current undertaking to achieve the Agency’s objective.

This current undertaking is pursuant to an amended lawsuit settlement agreement between EPA and litigants from environmental organizations in which EPA agreed to hold a public hearing and commence rulemaking to address renovations in public and commercial buildings (other than child-occupied facilities which are already covered under existing regulations) to the extent such renovations create lead-based paint hazards (“Public & Commercial LRRP Rule”).² As the Agency prepares for the upcoming public hearing their Notice requests information concerning:

- (1) The manufacture, sale, and uses of lead-based paint after 1978;
- (2) The use of lead-based paint in and on public and commercial buildings;
- (3) The frequency and extent of renovations on public and commercial buildings;
- (4) Work practices used in renovation of public and commercial buildings; and
- (5) Dust generation and transportation from exterior and interior renovations of public and commercial buildings.

As EPA moves forward in this process, we want to ensure that the process is fair, orderly, efficient, and places a shared responsibility on both the public and private sectors to gather the information requested. With these objectives in mind, please substantively reply to each of the following questions.

¹“Lead; Renovation, Repair and Painting Program for Public and Commercial Buildings; Request for Information and Advance Notice of Public Meeting,” 77 Fed. Reg. 76,996 (Dec. 31, 2012).

²“Amendment to Settlement Agreement Regarding Petitions for Review of EPA’s *Lead; Renovation, Repair and Painting Program*,” ¶ 4 (signed by U.S. Dep’t of Justice on Sept. 7, 2012).

Development of a TSCA Section 403 Rule to Identify Potential Lead Hazards in Public and Commercial Buildings:

Before it may promulgate a Public & Commercial LRRP Rule to regulate renovation and remodeling activities, EPA must develop a TSCA Section 403 rule to identify “dangerous levels of lead” specifically in those buildings. However, EPA can address renovations in public and commercial buildings through rulemaking only “to the extent such renovations create lead-based paint hazards.”³

The sole 403 hazard rule that EPA has issued to date concerns pre-1978 target housing. As that hazard rule states: “[I]t is ... important to emphasize that this rule only applies to pre-1978 target housing and certain child-occupied facilities, and that these standards were not intended to identify potential hazards in other settings.”⁴ EPA then spent more than seven years after the rule was finalized deciding how to regulate renovation activities in residences.⁵ However, EPA has yet to propose a 403 hazard rule for public and commercial structures. Nonetheless, the amended litigation settlement agreement signed by DOJ on September 7, 2012, sets forth a timeline for EPA to promulgate proposed and final rules to regulate renovation activities in public and commercial buildings – even though the required basic and foundational finding of any “hazard” has not yet been identified for those structures.

1. In the amended litigation settlement agreement, EPA has identified dates by which it will convene a Small Business Advocacy Review Panel, issue any proposed rule, and issue any final rule, but only with regard to a Public & Commercial LRRP Rule. What are the dates by which EPA will take action for each of these events with regard to developing a TSCA Section 403 hazard rule to identify any “dangerous levels of lead” in public and commercial buildings?
2. What is the chronology by which EPA plans to issue any proposed and final TSCA Section 403 rules for public and commercial buildings, as relative to issuance of proposed and final Public & Commercial Building LRRP Rules? In other words, does EPA plan to issue a public and commercial 403 hazard rule before, concurrently, or after any Public & Commercial LRRP Rule?
3. Does EPA believe it is appropriate to issue proposed and final Public & Commercial LRRP Rules before or concurrently with issuance of proposed and final Section 403 hazard rule for those structures?

As explained above, EPA waited to issue a final Residential LRRP Rule more than seven years after it first identified lead-based paint hazards in target housing under TSCA section 403. In the public and commercial buildings context, does EPA believe that it is appropriate to begin working on a rule prior to the identification of a hazard? If so, how can the Agency be sure steps taken in the rule will prevent any potential hazards if they have not yet been identified? How do you justify the difference in the time periods described above for the Residential LRRP rule (including the issuance of a Section 403 Rule) and the Public & Commercial LRRP Rule?

³ 77 Fed. Reg. at 76,997, col. 2 (Dec. 31, 2012).

⁴ “Lead; Identification of Dangerous Levels of Lead [in Pre-1978 Target Housing],” 66 Fed. Reg. 1206, 1211, col. 3. (Jan. 5, 2001) (emphasis added).

⁵ Final LRRP Rule for Pre-1978 Target Housing, 73 Fed. Reg. 21,692 (April 22, 2008).

EPA's Efforts to Gather Information from Federal and Other Government Building Owners and Managers:

Any Public & Commercial LRRP Rule would have a major impact on federal and other government-owned buildings. To this end, the General Services Administration (GSA) is the nation's largest public real estate organization and provides workspace in commercial buildings for more than 1 million federal workers through its Public Buildings Services (PBS). PBS's commercial real estate portfolio covers over 8,100 leases in excess of 171 million square feet and 1,500 government-owned buildings across the nation.⁶ Likewise, the infrastructure of the Department of Defense (DoD) encompasses several hundred thousand buildings at more than 5,000 different locations or sites.⁷ The footprint of the Veterans Administration (VA) is marked by 5,500 buildings and 1,600 leases totaling approximately 142 million square feet, with an average age approaching 60 years.⁸ Also, the Architect of the Capitol (AOC) is responsible for the U.S. Congress and Supreme Court and maintaining their 17.4 million square feet of buildings on Capitol Hill.⁹

1. Please provide the list EPA has developed of inter-agency staff contacts at GSA, DoD, VA, AOC and other affected agencies that manage federal buildings who may assist in providing or gathering information requested by the Notice. If no such list exists, please describe whether and by when EPA plans to develop a contact list of federal agency staff who may assist with information collection.
2. Please describe any communication and contact EPA has had with facilities and leasing management staff from GSA, DoD, VA, AOC and other federal agencies to determine if any of the information requested by the Notice already exists. If EPA has had no such contact, please describe whether and by when EPA plans to meet or communicate with federal agency staff to determine what, if any, information requested by the Notice already exists.
3. What plans, procedures, or methods does EPA employ to gather information requested in the Notice that does not already exist, specifically through federal inter-agency coordination? Will EPA develop and implement such plans for federal inter-agency coordination? If so, by what date?
4. Has EPA coordinated with staff at GSA, DoD, VA, AOC and other agencies that may be affected by a future rule to determine the resources – including costs – these agencies would have to commit to comply? Please describe any such communications between EPA and federal agency staff with specificity and describe whether and by when EPA plans to meet or communicate with federal agency staff to determine what burdens would be imposed on them as a result of this potential rule.
5. The National Association of State Facilities Administrators (NASFA) is a non-profit organization of state government officials, and, according to its bylaws, NASFA's

⁶ An inventory of GSA properties is at <http://www.gsa.gov/portal/content/100783>.

⁷ See <http://www.defense.gov/about/dod101.aspx>.

⁸ See slide 6 at http://www.acec.org/advocacy/committees/pdf/annconv2011_va.pdf (presentation of Robert L. Neary, Jr., Acting Director, VA Office of Construction and Facilities Management, to American Council of Engineering Companies) (March 31, 2011)

⁹ See <http://aoc.gov/about-aoc/responsibilities-architect>.

objectives include efforts “[t]o gather, analyze and distribute information, including data on state facilities policies and practices, legislation, new programs, and other items of interest to the States.”¹⁰ Has EPA conducted any outreach specifically to engage managers of state and municipal buildings to assist in gathering information requested by the Notice, such as coordination with organizations like NASFA? Please describe such outreach with specificity or whether and by when EPA will develop and implement such plans to coordinate with NASFA and other similar entities. If EPA has conducted any outreach, please also detail any response from the organizations.

6. The National Institute of Building Sciences (NIBS) was authorized by Congress in 1974 to “serve as an interface between government and the private sector ... [NIBS’s] public interest mission is to serve the Nation by supporting advances in building science and technology to improve the built environment.” Further, NIBS “has provided the opportunity for free and open discussion of issues and problems ... between government and the private sector construction industries. The Institute brings together representatives of regulatory agencies, legislators and representatives of the private sector to open working sessions that seek a consensus solution to problems of mutual concern.”¹¹

Has EPA developed a contact list of, or communicated in any way with, officials or staff at NIBS for assistance in gathering information requested by the Notice? Please provide such contact list and describe such communications with specificity. If EPA has not done this, by when EPA will develop a contact list and implement a communications plan with NIBS?

7. In the December 31, 2012, Notice, EPA states that it has “already gathered and reviewed” information relevant to development of a Public & Commercial Buildings LRRP Rule.¹²

7.a) To what extent is information already in EPA’s possession responses to the requests in items (1) – (5) of the Notice?

7.b) Has this information been made available to the public? If not, why? If yes, how may the public most easily gain access it?

7.c) Has EPA provided this “already gathered and reviewed” information to any federal, state, or local government agencies to assist in collecting additional information requested in the Notice?

7. d) Why has this information not been made available to the relevant Subcommittee of the Senate Environment and Public Works Committee?

¹⁰ See <http://www.nasfa.net/displaycommon.cfm?an=1&subarticlenbr=1>. NASFA’s website provides contact information for its Reference and Resource Committee which functions “to gather and update baseline data to quantify the scale and scope of the assets and property for which our members are responsible,” with regard to “building design, construction, operations, and maintenance areas, along with ... property management and capital budgeting capacities.” See <http://www.nasfa.net/associations/4146/files/Cmte%20Descriptions%20for%20FY13.pdf>.

¹¹ See <http://www.nibs.org/?page=about>.

¹² 77 Fed. Reg. at 76,997, col. 3.

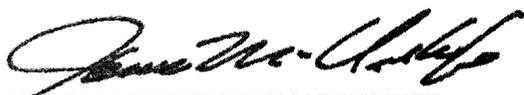
EPA's Efforts to Gather Information with Regard to Information on Manufacture and Uses of Lead-Based Paint:

With regard to items (1) and (2) requested in the Notice, certain federal agencies and organizations may assist in providing or gathering information available regarding the manufacture, sale, and use of lead-based paint both after 1978, and in and on public and commercial buildings.

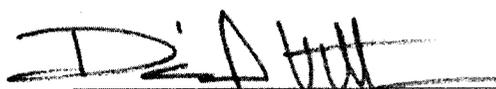
1. The Departments of Labor, Commerce, and Health and Human Services, and the National Institutes of Health, Centers for Disease Control and Prevention, and Consumer Products Safety Commission, are among federal entities that may already have information regarding items (1) and (2). Has EPA developed a contact list of, or communicated in any way with, federal agencies that may assist in providing or gathering information regarding these Notice items? Please provide the contact list and describe such communications with specificity or describe whether and by when EPA will develop a contact list and implement a plan for federal inter-agency communications.
2. Has EPA developed a contact list of, or communicated in any way with, state and local public health and consumer product agencies that may assist in providing or gathering information in Notice items (1) and (2)? Please provide the list and describe such communications with specificity or describe whether and by when EPA will develop a contact list and implement a communications plan with state and local agencies.
3. Has EPA developed a contact list of, or communicated in any way with paint manufacturers and their associated trade organizations (such as the American Coatings Association, www.paint.org) that may assist in providing or gathering information regarding Notice items (1) and (2)? Please provide such contact list and describe such communications with specificity or describe whether and by when EPA will develop a contact list and implement a communications plan with paint manufacturers.

Thank you for your consideration of this matter. Please provide your thorough response by February 28, 2013.

Sincerely,



James M. Inhofe
United States Senator



David Vitter
United States Senator



Deb Fischer
United States Senator



Mike Crapo
United States Senator