

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NEW YORK COALITION TO END)	
LEAD POISONING, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Case No. 08-1235
)	(Consolidated with No. 08-1258)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	
)	

STATUS REPORT

On April 22, 2008, the United States Environmental Protection Agency (“EPA”) published a rule entitled “*Lead; Renovation, Repair, and Painting Program; Final Rule*” in the Federal Register, 73 Fed. Reg. 21692 (the “RRP Rule”). The New York City Coalition to End Lead Poisoning, *et al.* (petitioners in No. 08-1235) and Sierra Club, *et al.* (petitioners in No. 08-1258) (collectively “Petitioners”) each filed petitions for review of the Rule. In August 2009, EPA and Petitioners entered into a settlement agreement (“Agreement”) which provides for EPA to take a series of actions, including certain rulemaking proposals and requests for comment (as outlined below).

On August 26, 2009 the parties jointly moved to hold the present action in abeyance pending completion of the terms of the Agreement. On September 14, 2009, the Court granted the parties' motion, and ordered EPA to file periodic status reports. Pursuant to that Order, EPA submits the following status report:

1. Under the Agreement, EPA agreed to take, and already has taken, a number of different actions. These include, but are not limited to, the following:

A. EPA agreed to consider amending the RRP Rule to eliminate the "opt-out" provision, which allowed homeowners to opt-out of the RRP Rule's requirements in certain limited situations. EPA fulfilled this requirement when it signed a final rule eliminating the opt-out provision on April 22, 2010. *See* "Lead; Amendment to the Opt-out and Recordkeeping Provisions in the Renovation, Repair and Painting Program," 75 Fed. Reg. 24,802 (May 6, 2010). Removal of the opt-out provision was challenged by other parties before this Court, which denied such challenge. *National Ass'n of Homebuilders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012).

B. EPA agreed to sign a Notice of Proposed Rulemaking by April 22, 2010 in order to take public comment on, among other things, whether the RRP Rule should be amended to add dust-lead testing and achievement of the regulatory dust-lead hazard standards as a "clearance" requirement. EPA fulfilled this requirement when it signed such a proposed rule on April 22, 2010. 75 Fed. Reg.

25,038 (May 6, 2010). After consideration of public comments and the record, EPA determined that imposing such requirements was not warranted and published a final rule expressing this determination in August 2011. “Lead; Clearance and Clearance Testing Requirements for the Renovation, Repair and Painting Program,” 76 Fed. Reg. 47,918 (Aug. 5, 2011).

2. Under the Agreement, EPA also agreed to a deadline and certain milestones related to proposing work practice standards for renovations to both the exterior and the interior of public buildings built before 1978 and commercial buildings (“Work Practice Standards”), which EPA would then finalize unless it determined that such renovations do not create a lead-based paint hazard. The deadlines for proposed and final action on the Work Practice Standards established in the Agreement were extended by subsequent agreement of the parties and by EPA’s exercise of its rights under the Agreement. *See* Doc. No. 1295994, ¶ 4; Doc. No. 1360387, ¶ 3. Under the Agreement as amended in June 2015, unless EPA concludes that renovation activities in pre-1978 public and commercial buildings do not create a lead-based paint hazard, EPA would propose Work Practice Standards applicable to such activities by March 31, 2017, and take final action on any such proposal within 18 months of its publication in the Federal Register.

3. The Agreement called for EPA completing certain milestones in conjunction with its ultimate determination and action(s) on the Work Practice Standards. Specifically, EPA agreed to: (a) sign an Advanced Notice of Proposed Rulemaking for non-residential buildings by April 22, 2010; (b) seek advice from the Science Advisory Board regarding risk assessment methodology for non-residential buildings by September 30, 2011; (c) convene a public meeting to discuss information for consideration in the public and commercial buildings proposal by July 31, 2013; and (d) make its best efforts to ensure that Small Entity Representatives (“SERs”) were selected for a Small Business Advocacy Review (“SBAR”) panel and that a panel was convened by August 29, 2014 or, alternatively, to notify Petitioners of the status of the panel process.

4. Consistent with the Agreement, on April 22, 2010, EPA signed an Advanced Notice of Proposed Rulemaking regarding EPA’s intention to propose Work Practice Standards and/or to evaluate renovation activities in public buildings built before 1978 and in commercial buildings.

5. Consistent with the Agreement, EPA initially consulted with the Science Advisory Board in July 2010 regarding EPA’s risk assessment methodology used to support the development of a lead-based paint hazard standard for non-residential public and commercial buildings, and initiated the

review process in December 2010, well in advance of the September 2011 deadline.

6. Consistent with the Agreement, SERs were selected, and an SBAR pre-panel outreach meeting was held on December 9, 2014, although this occurred at a date later than originally contemplated in the Agreement.

7. EPA has continued to work on determining the extent to which renovations of pre-1978 public and commercial buildings do or do not create lead-based paint hazards and on developing appropriate Work Practice Standards for such renovation activities, to the extent they are deemed to be necessary. EPA presently is focused on two critical aspects of this work:

A. EPA is conducting an industry survey on renovations performed in public and commercial buildings. The information collection process utilizes separate questionnaires for contractors, building lessors and managers, building owners, and building occupants. The information collected includes: building and activity patterns that may affect exposures to dust-lead from renovation activities; the number of firms that perform renovations; the types and numbers of renovation activities that are performed; the extent to which various work practices are currently being used in renovation jobs; and the extent to which various work practices that help with the containment and cleanup of dust-lead are

currently being used in renovations. In support of this information collection process:

i. EPA published a Federal Register notice in December 2013 requesting comments on a proposed Information Collection Request (“ICR”), 78 Fed. Reg. 73,520 (Dec. 6, 2013), and in July 2014 published a second Federal Register notice, 79 Fed. Reg. 44,168 (July 30, 2014) announcing a revised ICR. After the Office of Management and Budget approved the ICR in August 2015, EPA and its contractor began working to implement the survey in September 2015, which involved complex issues relating to computer programming for the three different versions of the survey and certain administrative hurdles. After addressing these unanticipated issues, the initial round of 5,000 survey letters was mailed in December 2016, a second round of 5,000 was mailed in February 2017, and a third round of 5,000 was mailed in June 2017 (with follow-up phone calls after each round).

ii. Two more rounds of mailings (approximately 25,500 letters each) are currently planned in 2017. The survey has been designed in rounds in order to facilitate recalibration of subsequent rounds of mailings to reach as representative a sample as possible of the twelve strata (defined by the establishment size and industry classification groups) within the survey by the end of the process. Thus, before sending out the next two rounds of mailing, EPA and

its contractor are in the process of evaluating the response rate to the first three rounds of mailings (totaling 15,000 survey letters) in order to re-design the balance of the sample and adaptively optimize the sample allocations to assure the best possible approximation of study estimates and precision targets.

B. EPA also has continued its work on a modeling approach for estimating exposures and incremental health effects from lead due to renovation, repair, and painting activities in public and commercial buildings. In June 2016, as a result of peer review feedback, EPA refined its approach to estimate exposures, blood lead changes, and health effects from renovations. EPA also completed an initial round of modeling. Additional modeling runs will be conducted using data from the industry survey once it is completed.

8. Due in part to the continuing activities outlined above, and notwithstanding EPA's best efforts, EPA was not able to take all the actions required under the Agreement to have been completed by March 31, 2017 (*see* Paragraph 2, *supra*).

9. EPA presently intends to continue its activities on the Work Practice Standards, including the specific actions set forth in Paragraph 7 above.

Respectfully submitted,

DATE: August 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for all other parties, who have registered with the Court's CM/ECF system.

Date: August 22, 2017

/s/ Perry M. Rosen

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