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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I

[EPA-HQ-OPPT-2013-0815; FRL-9906-09]

Records Related to OSHA's Construction Standard for Lead and Renovations of Public and Commercial Buildings; TSCA Section 21 Petition; Reasons for Agency Response

AGENCY: Environmental Protection Agency (EPA).

ACTION: Petition; reasons for Agency response.

SUMMARY: This document provides the reasons for EPA's response to a petition it received under the Toxic Substances Control Act (TSCA). The TSCA section 21 petition was received from the National Center for Healthy Housing, the International Union of Painters & Allied Trades, the Lead and Environmental Hazards Association, and the National Association of Lead and Healthy Homes Grantees (petitioners) on October 31, 2013. The petitioners requested EPA to promulgate a rule pursuant to TSCA section 8(d) requiring property managers, building owners, and contractors disturbing lead-based paint in public and commercial buildings (P&CBs) to submit to EPA certain records related to the Occupational Safety and Health Administration's (OSHA's) construction standard for lead. After careful consideration, EPA denied the TSCA section 21 petition by letter on January 28, 2014, for the reasons discussed in this document.

DATES: The EPA's response to this TSCA section 21 petition was signed on January 28, 2014.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:*
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SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of particular interest to building owners, property managers and contractors who disturb painted surfaces in P&CBs. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How Can I Access Information About this Petition?

The docket for this TSCA section 21 petition, identified by docket identification (ID) number EPA-HQ-OPPT-2013-0815 is available at <http://www.regulations.gov> or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West Bldg., Rm. 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

II. TSCA Section 21

A. *What is a TSCA Section 21 Petition?*

Under TSCA section 21 (15 U.S.C. 2620), any person can petition EPA to initiate a rulemaking proceeding for the issuance, amendment, or repeal of a rule under TSCA sections 4, 6, or 8 or an order under TSCA sections 5(e) or 6(b)(2). A TSCA section 21 petition must set forth the facts that are claimed to establish the necessity for the action requested. EPA is required to grant or deny the petition within 90 days of its filing. If EPA grants the petition, the Agency must promptly commence an appropriate proceeding. If EPA denies the petition, the Agency must publish its reasons for the denial in the **Federal Register**. A petitioner may commence a civil action in a U.S. district court to compel initiation of the requested rulemaking proceeding within 60 days of either a denial or the expiration of the 90-day period.

B. *What Criteria Apply to a Decision on a TSCA Section 21 Petition?*

Section 21(b)(1) of TSCA requires that the petition “set forth the facts which it is claimed establish that it is necessary” to issue the rule or order requested. 15 U.S.C. 2620(b)(1). Thus, TSCA section 21 implicitly incorporates the statutory standards that apply to the requested actions. Section 8(d) of TSCA authorizes EPA to require the submission of unpublished health and safety studies initiated or conducted by, or known to or reasonably ascertainable by, manufacturers, processors, and distributors of chemical substances or mixtures. Studies may be excluded “if the Administrator finds that submission of lists of such studies are unnecessary to carry out the purposes of [TSCA].” 15 U.S.C. 2607(d)(1).

In addition, TSCA section 21(b)(4)(B) provides the standards a court must use to decide whether to order EPA to initiate rulemaking in the event of a lawsuit filed by the petitioner after denial of a TSCA section 21 petition: “If the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that ... there is a reasonable basis to conclude that the issuance of such a rule ... is necessary to protect health or the environment against an unreasonable risk of injury,” the court shall order the EPA Administrator to initiate the requested action. 15 U.S.C. 2620(b)(4)(B).

Accordingly, EPA relied on the standards in TSCA section 21 and in the provisions under which actions have been requested to evaluate this TSCA section 21 petition.

III. Summary of the TSCA Section 21 Petition

A. What Action was Requested?

On October 31, 2013, the National Center for Healthy Housing, the International Union of Painters and Allied Trades, the Lead and Environmental Hazards Association, and the National Association of Lead and Healthy Homes Grantees petitioned EPA to promulgate a rule pursuant to TSCA section 8(d) requiring property managers, building owners, and contractors disturbing lead-based paint in P&CBs to submit to EPA certain records related to OSHA’s construction standard for lead. Specifically, the petition asks EPA to collect the following records:

1. Personal or area air sampling data and any resultant exposure assessments conducted pursuant to 29 CFR 1926.62(d).
2. Employee medical surveillance data and any resultant evaluation pursuant to 29 CFR 1926.62(j) or medical removals of employees removed from current exposure to lead pursuant to 29 CFR 1926.62(k).

3. Paint analysis results and any resultant studies that were used to determine whether or not initial exposure monitoring should be required pursuant to 29 CFR 1926.62(n)(4).

4. Data and studies considered in the development of a compliance plan and in the development of any updates pursuant to 29 CFR 1926.62(e)(2), including: descriptions of each activity in which lead is emitted; descriptions of the specific means employed to achieve compliance and, where engineering controls were required, engineering plans and studies used to determine methods selected for controlling exposure to lead.

5. Air monitoring data collected pursuant to 29 CFR 1926.62(e)(2) which documents the source of lead emissions.

6. Data considered in the evaluation of the effectiveness of mechanical ventilation in controlling exposure under 29 CFR 1926.62(e)(3) (Ref. 1, p. 2).

B. What Support Do the Petitioners Offer?

The petitioners suggest that the documents received under a TSCA section 8(d) reporting rule would provide EPA with “critical information” it needs to analyze lead hazards created by renovations of P&CBs as required by the Lead-Based Paint Hazard Reduction Act of 1992 (Ref. 1, p. 2). The petitioners also generally refer to the dangers of lead and the hazards, including those from the renovation of residences found by EPA in the 2008 Renovation, Repair and Painting rule, and the need to similarly protect all Americans from lead hazards created by the renovation of P&CBs (Ref. 1).

In reference to the OSHA lead standards and the P&CB rulemaking analysis, the petitioners cite to public comments made surrounding EPA’s June 26, 2013 public meeting on the P&CB rulemaking, including those from the National Apartment

Association (Ref. 2), the Independent Electrical Contractors (Ref. 3), the Associated General Contractors of New York State (Ref. 4), the National Institute of Building Sciences (Ref. 5), the National Roofing Contractors Association (Ref. 6), and the Commercial Properties Coalition (Ref. 7).

IV. Disposition of TSCA Section 21 Petition

A. What was EPA's response?

After careful consideration, and for the following reasons, EPA denied the petitioners' request that EPA promulgate a reporting rule pursuant to TSCA section 8(d). EPA will, however, seek to obtain this type of information in an alternative manner. A copy of the Agency's response, which consists of a letter to the petitioners, is available in the docket for this TSCA section 21 petition.

B. What is EPA's reason for this response?

For the purpose of making its decision, EPA evaluated the information presented or referenced in the petition as well as the Agency's authority and requirements under TSCA sections 8 and 21. After careful consideration, EPA denied the request based on the petitioners' failure to set forth sufficient facts establishing that it is necessary to initiate a TSCA section 8(d) reporting rule. In addition, while the records requested by the petitioners are potentially useful, they are not necessary to carry out the purposes of TSCA or to support the P&CB rulemaking analysis. Furthermore, to the extent that such information could nonetheless be informative, promulgating a TSCA section 8(d) rule is not an efficient or effective way to get the information.

EPA believes that it is not necessary or appropriate to promulgate a TSCA section 8(d) rulemaking at this time. First, EPA consulted with OSHA and determined that in

many circumstances, a number of the records requested by the petitioners do not actually need to be maintained by employers under OSHA's construction standard for lead. For example, most building owners and property managers are not required to keep the requested records because the routine maintenance activities commonly performed by their employees are not subject to OSHA's construction standard for lead. Second, construction employers performing renovation work involving lead-based paint may not need to keep all of the records in question if their employees are not exposed above the standard's permissible exposure limit (PEL) or action level. Third, in OSHA's experience, employers that do not comply with the PEL are unlikely to comply with the standard's recordkeeping requirements, further lessening the amount of responsive information available. Thus, based on consultations with OSHA, EPA believes the amount and type of information the Agency could realistically expect to receive under a reporting rule would be significantly limited.

EPA also has reservations regarding the potential for this information to inform the P&CB rulemaking analysis. For example, as indicated by OSHA, air sampling records are most commonly found in the form of a simple report indicating whether samples are above or below an applicable permissible exposure limit. Information contextualizing this exposure data is not likely to be ascertainable from employers' OSHA records. Without such contextual information, these records would be of limited utility to EPA in modeling exposure and identifying and evaluating hazards in P&CBs.

Based on the expected limitations in the availability and utility of the records to EPA's analysis of lead-based paint hazards created by renovations in P&CBs, EPA does not believe that the expenditures of time and resources inherent in proposing and

finalizing a TSCA section 8(d) rule are justified. Nonetheless, EPA will seek to obtain this type of information in a more targeted, efficient, and less burdensome manner. Specifically, EPA is already working with OSHA to determine the availability of lead sampling and exposure data in OSHA enforcement records. Pursuant to its authority under TSCA, EPA will also issue information request letters to a smaller, targeted group of entities. This approach will allow EPA to collect and assess the utility of available OSHA records identified by the petitioners, as well as collect other, potentially relevant information, without being limited in scope to “health and safety studies” under TSCA section 8(d).

Finally, in addition to previous and ongoing efforts to obtain additional data and information on lead and renovations in P&CBs from industry, the general public, and other Federal agencies, EPA is preparing to conduct an industry survey to collect various types of information from the public and commercial building industry (Ref. 8). This survey, “Survey of the Public and Commercial Building Industry,” is specifically designed to target additional information EPA expects may be useful to the P&CB analysis (Ref. 8).

V. References

As indicated under **ADDRESSES**, a docket has been established for this document under docket ID number EPA-HQ-OPPT-2013-0815. The following is a listing of the documents that are specifically referenced in this action. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other

documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. National Center for Healthy Housing, International Union of Painters & Allied Trades, Lead and Environmental Hazards Association, National Association of Lead and Healthy Homes Grantees. Citizen Petition to EPA Regarding OSHA Exposure Assessments in Renovations of Public and Commercial Buildings. October 31, 2013.

Available at:

http://www.epa.gov/opptintr/chemtest/pubs/Section_21_on_PnCBs_Resubmit_10.31.2013.pdf.

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

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

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

5. National Institute of Building Sciences comment posted on April 3, 2013 at EPA-HQ-OPPT-2010-0173-0153.

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

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

8. EPA. Agency Information Collection Activities; Proposed Collection; Comment Request; Notice. **Federal Register** (78 FR 73520, December 6, 2013) (FRL-9902-85)

List of Subjects in 40 CFR Chapter I

Environmental protection, Lead, OSHA, Public and commercial buildings, Renovation.

Dated: February 7, 2014.

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