October 2, 2023

Via www.regulations.gov

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Office of Chemical Safety and Pollution Prevention
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
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Re: Comments on the Proposed Rule Reconsidering the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels (EPA–HQ–OPPT–2023–0231)

1. Introduction

Thank you for the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed rule to reconsider the dust-lead hazard standards (DLHS) and dust-lead post-abatement clearance levels (DLCL).[1] These comments are submitted jointly by the following associations (collectively, the Associations):

- **National Multifamily Housing Council (NMHC)** – NMHC is a national nonprofit association that represents the leadership of the apartment industry. NMHC members engage in all aspects of the apartment industry, including ownership, development, management, and finance, to help create thriving communities by providing apartment homes for 38.9 million Americans, contributing $3.4 trillion annually to the economy.

- **National Apartment Association (NAA)** – NAA is a federation of 141 state and local affiliates that encompasses over 95,000 members representing more than 11.6 million apartment homes globally. NAA serves as the leading voice and preeminent

[1] *Reconsideration of the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels*, Proposed Rule, 88 Fed. Reg. 50444 (Aug. 1, 2023) ("Proposed Rule").

resource through advocacy, education, and collaboration on behalf of the rental housing industry.

- **National Association of Home Builders (NAHB)** – NAHB is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily construction, remodeling, multifamily ownership, building material trades, and commercial and light industrial construction projects. The overwhelming majority of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration, and NAHB members collectively employ over 3.4 million people nationwide.

- **National Association of REALTORS® (NAR)** – With 1.5 million members, NAR is America's largest trade association. Membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in all aspects of the real estate industry.

- **National Leased Housing Association (NLHA)** – NLHA represents the interests of 550 member organizations involved in federally assisted rental housing including developers, owners, lenders, housing agencies, and nonprofits. NLHA's members provide affordable housing for over three million families.

- **The Real Estate Roundtable (RER)** – The RER is the public policy advocate for the U.S. commercial real estate industry. The RER brings together leaders of the nation's top publicly held and privately-owned real estate ownership, development, lending, and management firms with leaders of major national real estate trade associations to address key national policy issues impacting real estate and the economy. The RER's 18 national real estate trade association partners represent more than one million people involved in virtually every aspect of the real estate business. Roundtable members are eager to help our nation meet its current challenges and bring long-term sustainability to the industry, which generates tax revenue that fuels local

governments; supports retirees, schools, and hospitals; and creates economic growth for businesses.

The Associations fully support EPA's initiative to prioritize and address childhood lead exposure in all affected communities, including children living in communities with environmental justice concerns. EPA regulations have been a substantial factor in the dramatic decrease in dust-lead levels.[2] The Associations, however, have concerns regarding the manner in which EPA proposes to achieve further reduction of these levels and the associated unintended health impacts. While lower dust-lead levels *per se* are less harmful to human health, EPA also must consider the health impacts of the proposed regulations on access to the affordable housing. Housing instability has detrimental effects on human health and the health of children in particular.[3] These detrimental health effects can be measured with the same indicators as the dust-lead levels, such as neurocognitive decrements in children that grow up in unstable housing circumstances.

2. Health Impacts of the Standards

When establishing dust-lead levels, EPA should not view the DLHS and DLCL in a vacuum but must consider the broader impacts. As EPA recognized in its proposal,[4] these dust-lead levels are incorporated by reference in several HUD regulations.[5] HUD applies these regulations across the housing sector and the DLCL and DLHS create direct obligations for

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[2] EPA, *Biomonitoring – Lead*, https://www.epa.gov/americaschildrenenvironment/biomonitoring-lead (last updated Sept. 21, 2022).

[3] Patrick J. Fowler *et al. Housing Mobility and Cognitive Development: Change in Verbal and Nonverbal Abilities,* 48 Child Abuse & Neglect 104 (2015), https://www.sciencedirect.com/science/article/abs/pii/S0145213415002227?via%3Dihub. *See also,* Low-income families struggle to secure safe and stable housing in tight affordable housing markets that remain difficult to navigate (The Joint Center for Housing Studies of Harvard University, The State of Nation's Housing 2012 (2012), https://www.jchs.harvard.edu/sites/default/files/son2012.pdf; ICPH, Foreclosures and Homelessness: Understanding the Connection (Jan. 2013), https://monarchhousing.org/wp-content/uploads/2013/03/ICPH_policybrief_ForeclosuresandHomelessness.pdf). A growing body of evidence demonstrates associations between housing problems and poorer child mental health and school outcomes (Emma K. Adam *et al.*, *Beyond Quality: Parental and Residential Stability and Children's Adjustment*, 13 Association for Psychological Science 210 (2014), https://journals.sagepub.com/doi/10.1111/j.0963-7214.2004.00310.x; Tim Jellyman & Nicholas J Spencer, *Residential mobility in childhood and health outcomes: a systematic review*, 62 Journal of Epidemiol Community Health 584 (2008), https://pubmed.ncbi.nlm.nih.gov/18559440/; Tama Leventhal & Sandra Newman, *Housing and child development*., 32 Children and Youth Services Review 1165 (2010), https://www.sciencedirect.com/science/article/abs/pii/S0190740910000721.).

property owners and housing providers, often influencing their decisions regarding the use of pre-1978 target housing. This type of housing, most often used for affordable housing, or a child occupied facility (COF), is already in scarce supply across the country.[6] Amended dust-lead levels, including a DLHS of greater than zero (GTZ), which is virtually impossible to comply with, will deter property owners and housing providers from allocating their property for target housing or COF. Under the proposal, fewer properties will be below the amended DLHS and abatement costs will increase. This would lead to a further decrease in the supply of affordable housing for children and, thus, result in detrimental health effects to children, including children living in communities with environmental justice concerns.

EPA stressed[7] that the GTZ proposal for the DLHS is the result of the U.S. Court of Appeals for the Ninth Circuit 2021 opinion in *A Community Voice, et al v. U.S. Environmental Protection Agency*, regarding the factors EPA should consider when setting the DLHS.[8] The majority held that non-health factors, such as laboratory capabilities, capacity, and achievability after an abatement are factors that are considered when implementing the standard, not when identifying the hazards to health.[9] However, EPA must consider the full impacts on health. If adopted as proposed, the GTZ DLHS would likely have equal or more serious negative health effect on the population EPA intends to protect through these regulations.

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[4] Proposed Rule at 50447.

[5] 40 C.F.R. §§ 745.227, 745.223

[6] HUD Office of Policy Development and Research, Worst Case Housing Needs: 2023 Report to Congress - Executive Summary (Aug. 21, 2023), https://www.huduser.gov/portal//portal/sites/default/files/pdf/Worst-Case-Housing-Needs-2023-Executive-Summary.pdf.

[7] Proposed Rule at 50445.

[8] *A Cmty. Voice v. U.S. Env't Prot. Agency*, 997 F.3d 983, 992 (9th Cir. 2021).

[9] *Id.* at 992. Note that the dissent found that EPA "is not charged by Congress to set lead-dust hazard standards to eliminate *any* adverse human health effects. Instead, Congress charged EPA to consider all factors (including environmental, economic, social and health) in setting the lead-dust hazard standards." *Id.* at 995 Smith, N.R. dissenting. The dissent expresses the statutory intent. However, we consider the majority opinion in these comments.

a. EPA Must Identify and Consider the Health Effect Impacts of the Proposed Regulations.

EPA requests guidance from the public on the application of "health" considerations under the rulemaking. EPA has requested comment on health trade-offs, specifically related to adverse health effects due to the increase in housing insecurity alongside the benefits of reduced lead exposure.[10] Further, EPA grapples with whether the implementation of levels that align with the post-1977 background levels would address the 2021 Ninth Circuit opinion.[11] However, EPA retains the discretion and obligation to broadly consider health endpoints. For these reasons, EPA should fully examine the related public health considerations of the proposed standards.

The proposed rule focuses on public health considerations related to population health effects from IQ decrements due to lead exposure. EPA uses IQ to quantify and monetize the potential impact to society from IQ decrements in certain populations exposed to lead. Under this analysis, IQ represents a loss of cognitive function that may correlate with the diagnosis of cognitive disorders (e.g., attention problems, hyperactivity, etc.), memory, processing, or neurobehavioral effects. EPA relies heavily on IQ to quantify the benefit from the overall rule because there is an association between the endpoint and certain societal benefits or burdens. "IQ is one of many proxy variables for the more comprehensive concept of human capital that are predictive of important life outcomes."[12] The potential public health impacts could relate to members of the public with low range IQ having educational, vocational, and social failure.[13] The economic literature related to the loss of IQ from lead exposure states that the adverse

[10] Proposed Rule at 50467.

[11] *Id.* at 50458.

[12] EPA, Economic Analysis of the Proposed Reconsideration of the Dust-Lead Hazard Standards and Post-Abatement Clearance Levels, at 6-26 (June 2023), https://downloads.regulations.gov/EPA-HQ-OPPT-2023-0231-0393/content.pdf ("Economic Analysis")..

[13] *Review of the National Ambient Air Quality Standards for Lead*, Final Rule, 81 Fed. Reg. 71906, 71923 (Oct. 18, 2016).

effects may relate to educational attainment, labor participation, and lifetime earnings.[14] Research identifies a positive link between cognitive skills and lifetime earnings.

The Associations appreciate the value IQ contributes to identifying the overall wellness of individuals in our society. As described and referenced in the rulemaking it is a public health consideration. Therefore, if EPA has identified IQ as an endpoint for health risk, EPA must consider the other public health impacts of this proposed rule. Those impacts include the health impacts that stem from housing insecurity and homelessness related to the cognitive development, physical, and emotional health of children.[15] Housing insecurity that leads to frequent moves creates family stress that can impair children's socioemotional development.[16] Homeless infants tend to be diagnosed with certain health conditions more frequently than housed children. This includes upper respiratory infection, lower respiratory disease, fever, allergic reactions, and nutritional, endocrine, and metabolic disorders.[17] Further, homelessness makes treatment and medical adherence more difficult for people experiencing chronic illness, such as diabetes.[18] These related health considerations must be evaluated by EPA.

EPA has requested comment on the appropriateness of the "reportable level" standard.[19] As currently defined, the selection of the "reportable level" does not fit squarely within health considerations. EPA proposes to adopt a "greater than zero" or "any reportable level" standard for the DLHS. This is not a defined standard but is the "lowest analyte concentration (or amount) that does not contain a 'less than' qualifier and that is reported with confidence for a

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[14] Economic Analysis at pp. 6-25 to 6-26.

[15] *See* The Network for Public Health Law, Series: Preventing Housing Instability, Fact Sheet, The Public Health Implications of Housing Instability, Eviction, and Homelessness (Apr. 2021), https://www.networkforphl.org/wp-content/uploads/2021/04/Fact-Sheet-Public-Health-Implications-of-Housing-Instability-Eviction-and-Homelessness.pdf.

[16] Robert Julius Anastasio *et al*, *High residential mobility and young children's healthy* development in low-income families*: Exploring the moderating role of Head Start*, 59 Early Childhood Research Quarterly 96(2021), https://www.sciencedirect.com/science/article/abs/pii/S0885200621001253.

[17] Robin E. Clark *et al*. *Infants Exposed to Homelessness: Health, Health Care Use, And Health Spending From Birth to Age Six*, 38 Health Affairs 721 (2019), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2019.00090.

[18] Supra note 16.

[19] Proposed Rule at 50454.

specific method by an NLLAP-recognized laboratory."[20] In other words, the standard defaults to lowest feasible measurement. EPA set this target to meet the 2021 Ninth Circuit opinion directive to only consider health factors. However, this value is not based on benchmarks identified through modeling. Rather, EPA set the DLHS based upon what is feasible for existing NLLAP labs to identify. This is a technology-based, rather than a health-based, standard. In addition, it raises the potential that more precise labs will have a lower standard, whereas other labs will have a higher value for the reportable amount. This will allow for variances when identifying DLHS.

b. EPA Must Use the Best Available Science When Setting Protective Standards.

The Associations support implementation of protective standards to lower children's exposures to lead based upon the best scientific and technical data. Reliance on the best available science imparts neutrality over the process and reassures the public that EPA's regulatory decisions are fact-based assessments. Moreover, using reliable data will promote regulatory decisions that are based on sound logic.

The 2016 Lautenberg Amendments to the Toxic Substances Control Act (TSCA) incorporated a "best available science" standard into its decision-making processes.[21] The proposed rule states that EPA is informed by the "best available science" in establishing a relationship between exposures to lead and health effects.[22] EPA's reference to this established terminology in a TSCA rulemaking procedure implies its intent to apply the "best available science" standard established through Lautenberg to its scientific review and analysis. While the Lautenberg provision pertains to EPA decisions for carrying out sections 2603, 2604, and 2605 of TSCA, EPA appears to invoke the definition of the term as a guiding element in this rulemaking.[23] The term "best available science" is defined by EPA as "science that is reliable and unbiased. Use of best available science involves the use of supporting studies conducted in

[20] *Id.*

[21] Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. Law 114-182, § 17, 130 Stat. 448 (2016).

[22] Proposed Rule at 50448.

[23] 15 U.S.C. § 2625(h).

accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data.)."[24]

However, EPA has not met this standard. When EPA initially promulgated these standards, EPA conducted a Risk Analysis[25] to support the regulatory standards under Title X and Tile IV. The Risk Analysis set forth the hazard identification, exposure assessment, dose-response assessment, and risk characterization for lead exposures. The Risk Analysis was submitted to the EPA Science Advisory Board (SAB) who provided EPA with feedback on the scientific and technical analysis.[26] Based on the SAB's recommendations, EPA issued a supplemental Risk Analysis[27] in 2000. To establish the standards in the proposed rule, EPA has not conducted a new Risk Analysis and has engaged in very little peer review.

Upon review of the record and the supporting documents, it appears that EPA has not updated any of the technical materials used for its decision making. For instance, the only Risk Analyses related to TSCA section 403 are from 1998 and 2000. In June 2010, EPA issued two documents that addressed the approach to developing these standards: (1) Proposed Approach for Developing Lead Hazard Standards for Residences (U.S. EPA 2010c) and (2) Proposed Approach for Developing Lead Dust Hazard Standards for Public Commercial Buildings (U.S. EPA, 2010b).[28] Both documents were submitted to the SAB Lead Review Panel.[29] The SAB panel provided comments on the original and revised approach throughout 2010 and 2011. These analyses were plugged into the Technical Support Document for Residential Dust-Lead Hazard Standards Rulemaking that supported the 2019 rulemaking.[30] For the current

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[24] 40 C.F.R. § 702.33.

[25] EPA, Risk Analysis to Support Standards for Lead in Paint, Dust, and Soil (June 1998), available at https://nepis.epa.gov/Exe/ZyPDF.cgi/91015A1H.PDF?Dockey=91015A1H.PDF ("Risk Analysis").

[26] Id.

[27] Id.

[28] EPA, Technical Support Document for Residential Dust-Lead Rulemaking: Approach Taken to Estimate Blood Lead Levels and Effects from Exposures to Dust-lead (EPA-HQ-OPPT-2023-0231), at 12-13 (June 2023), https://downloads.regulations.gov/EPA-HQ-OPPT-2023-0231-0398/content.pdf.

[29] *Id*.

[30] *Id*.

rulemaking, EPA issued an updated Technical Support Document,[31] but it does not include documents subject to more recent SAB review; rather, it incorporates methodologies from the previous documents.[32]

Further, EPA bases its scientific data on the 2013 Integrated Science Assessment (ISA)[33] despite releasing an updated draft of the ten-year study in March 2023.[34] That draft 2023 ISA document received comments through June and still being finalized. EPA does not appear to reference the updated scientific assessment in this document. It is impossible for EPA to claim it has relied upon the best available science when it is missing the most updated summary, evaluation, and synthesis of data. Failure to review that document and to incorporate it into this standard is a significant failing of the Agency. Updates to lead-based paint (LBP) hazards should have been paused to allow for full peer review of the draft 2023 ISA.[35]

Putting aside that EPA is not relying on the best available science, we are concerned that the 2013 ISA is inadequate to base these regulatory standards upon. EPA set a "greater than zero" standard based upon the 2013 ISA and the Center for Disease Control and Prevention (CDC) acknowledgement that there is no known safe blood lead level.[36] The 2013 ISA does not provide conclusive data regarding the risks from low-level lead exposures. The 2013 ISA evaluates cognitive decrements and concludes "that there is a causal relationship between Pb exposure and decrements in cognitive function in children."[37] This conclusion is based upon findings from research cohorts who demonstrated higher blood and tooth lead levels and lower IQ and executive function.[38] These data do not consistently look at confounding factors such as

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[31] See supra note 28.

[32] TSD at 12-13.

[33] Proposed Rule at 50448.

[34] *Integrated Science Assessment for Lead (Pb) (External Review Draft)*, Notice, 88 Fed. Reg. 19302 (Mar. 31, 2023) ("2013 ISA").

[35] It is worth noting that the 2023 ISA is over 2,000 pages long and refers to hundreds of studies. EPA received request to extend the comment period but EPA only provided an additional 14-days stifling the opportunity for other researchers to add value to the document.

[36] Proposed Rule at 50455.

[37] 2013 ISA at 4-289.

[38] *Id.* at 4-283.

socioeconomic status, parental IQ, parental education, and the quality of the home environment. Confounding factors have the capacity to bias associations.[39] The 2013 ISA acknowledges that "most cohort studies" adjusted for some of these cofounders and that "some," but not all, studies addressed other associations such as parental smoking, birth order, and nutritional factors.[40] Moreover, the reported decrements of IQ less than 5 points are within the standard error of a single test, but the 2013 ISA dismisses this concern.[41] Further, these data do not establish a blood-lead threshold for lead toxicity.

Historically, these studies have considered low-level blood levels to be those ≥ 10 µg/dL.[42] However, our reference point for when lead requires intervention has continued to decrease. The blood lead reference value (BLRV) set by the CDC is 3.5 µg/dL.[43] This is significant because our society's interpretation of a low BLRV is now much different than what has been studied and reported over the last few years. Accordingly, there are very few studies or data on blood lead levels below 3.5 µg/dL.

Further, the 2013 ISA data related to cognitive function decrements offers limited evidence on the dose-response for lower blood lead levels. The 2013 ISA states that "[e]xamination of children with blood Pb levels in the range of <1 (at or below detection limits) to 10 µg/dL, with consideration of early or peak childhood blood Pb levels, has not identified a threshold for cognitive function decrements."[44] The studies, such as the Boston cohorts studied in Bellinger et al., 1992, reported that "a 1 µg/dL increase in age 2 year blood Pb level was associated with a -1.6 (95% CI: -2.9, -0.2) point change in FSIQ at age 10 years in 48 children with age 2-year blood Pb levels 1-9.3 µg/dL (detection limit not reported) and peak blood Pb

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[39] *Id.* at. 4-60, 4-274 to -279.

[40] *Id.* at 4-284.

[41] 2013 ISA at 4-280.

[42] *Id.* at 4-283 to -289.

[43] CDC, *Blood Reference Value*, https://www.cdc.gov/nceh/lead/data/blood-lead-reference-value.htm#:~:text=CDC%20uses%20a%20blood%20lead,higher%20than%20most%20children's%20levels (last reviewed Dec. 2, 2022).

[44] 2013 ISA at 4-289.

levels <10 µg/dL."[45] These data highlight the importance of identifying the complexities in interpreting and applying this information to public policy. The dose-response concept is crucial to understanding these data. Dose-response refers to a toxicological concept that every chemical is toxic but there are nontoxic doses or those that do not cause adverse health effects.[46] The "[p]oisonous effects are related to amount of substance present in doses to which organisms are exposed and the case-specific circumstances and conditions associated with each exposure scenario."[47] The dose-response data are necessary to identify when lead becomes a hazard. The 2013 ISA has not identified that threshold. The 2013 ISA does indicate that it is possible to eventually identify a "threshold for neurodevelopmental effects in children existing with lower blood levels than those currently examined."[48] The 2013 ISA offers synthesized studies on end of grade scores for children and acknowledges that certain data are less valuable where "findings of nonlinearity based only on concurrent blood Pb without regard to early childhood blood Pb are less certain because the magnitude and timing of Pb exposures contributing to the associations are uncertain."[49] In the context of this rulemaking, EPA adopts a fallback approach that lead is inherently or intrinsically toxic based on the lack of data to inform the dose-response paradigm.

> EPA understands the limitations of the epidemiological analyses, the lack of scientific studies evaluating low BLLS and acknowledges that a threshold could exist that is currently unidentified; but ultimately in its assessment of the available scientific research findings in the 2013 ISA for lead, the Agency observed that there is no evidence of a threshold below which there are no harmful health effects from lead exposure.[50]

EPA acknowledges here that the GTZ standard is an outgrowth of EPA's inability to identify an actual threshold and its interpretation of the Ninth Circuits remand. EPA appears to address uncertainty in the science by regulating down to the lowest possible metric.

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[45] *Id.* at 4-284 (citing Bellinger, 2008; Bellinger and Needleman, 2003).

[46] L.S. McCarty, *et al.*, *Evaluation of Inherent Toxicity Concept in Environmental Toxicology and Risk Assessment*, 39 Environmental Toxicology and Chemistry 235 (2020),https://doi.org/10.1002/etc.4881.

[47] *Id*. at 2357.

[48] 2013 ISA at 4-274.

[49] *Id.* 4-121.

[50] Proposed Rule at 50455.

> Because of the 2021 Court Opinion remanding the DLHS for reconsideration based only on health factors, the results of the analysis in the TSD, and the lack of discernible threshold in the evidence for the association of blood lead with harmful effects on cognition in young children, EPA proposes to change the DLHS to any reportable level of lead analyzed by an NLLAP-recognized laboratory.[51]

While the Associations are mindful of the Ninth Circuit's comments that uncertainty cannot be an excuse for inaction, EPA's proposal does not thoughtfully deal with the uncertainty. For example, EPA does not address that there are background levels of lead that will be captured by the GTZ standard. EPA considered a post-1977 DLHS that would set the floor of the DLHS at the background levels (0.2 µg/ft^2 for flows and 0.8 µg/ft^2 for window sills.)[52] Under the post-1977 DLHS, lead hazards not attributable to lead-based paints would not automatically become the responsibility of the property owners and housing providers since they may be attributable to different sources. We support efforts to eliminate these harms, but in the absence of sound scientific data, regulatory authorities cannot default to a GTZ standard rather than developing regulations based on the current science.

EPA previously identified these data gaps as justification for failing to act on LBP hazards. The Ninth Circuit panel rejected these arguments, in part, because EPA failed to identify why uncertainty justified the Agency's actions.[53] The Associations agree that EPA must consider the developing scientific information and scientific uncertainty as it continues to take steps towards further exposure reduction. However, EPA's proposal to adopt an any detectable level rather than analyzing existing data and presenting a standard that accounts for this uncertainty is not the answer. This is especially true given the broad impacts of the rule.

In its proposal, EPA did not rule out that finding an appropriate numeric value for DLHS is possible, but only stated that the GTZ value is preferred: "due to the aforementioned complexities with identifying a cutoff of risk or specific IQ/BLL metrics of interest that would be acceptable for purposes of setting the DLHS, […] EPA is not proposing the numeric standard

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[51] *Id.* at 50456.

[52] *Id.* at 50458.

[53] *A Cmty. Voice v. U.S. Env't Prot. Agency*, 997 F.3d at 993 (9th Cir. 2021).

approach for the DLHS as the Agency's preferred option." We would be pleased to work with EPA to help determine a numeric standard approach for DLHS that finds a better balance between the negative health effects of lead dust from floors and windowsills and the negative health effects of housing insecurity and lack of availability.

EPA stressed throughout its proposal that according to the opinion issued by the U.S. Court of Appeals for the Ninth Circuit in 2021, it may only consider health-based factors when establishing the DLHS. EPA then bases its decision to propose a GTZ DLHS on the Federal Lead Action Plan's conclusion that "no safe blood lead level in children has been identified."[54] The Ninth Circuit opinion does not require such a narrow interpretation, and as discussed above, EPA should consider the health impacts of the rule as it would be implemented.

EPA has the statutory authority to consider, based on all the scientific data in its possession, a permissible level of exposure to dust-lead from windowsills and floors. Moreover, EPA's suggestion that a new rulemaking may occur to propose new standards once the scientific community has established the low-level threshold[55] is flawed. It is unrealistic to believe that EPA can later backtrack and convince the public that a certain level of exposure is acceptable based on research when they previously told the public that it presented a hazard. To premise this rulemaking on the promise that it can be rectified later is dismissive of the regulated community's concerns and the impacts it will cause to affordable housing. The proposed rule is not relying upon the best available science. EPA is extrapolating from the lack of reliable data to apply a zero standard. EPA can and should do better.

3. Impacts on the Housing Community

Our members support efforts by the EPA and other regulatory agencies to decrease and eliminate the lead exposure from lead-based paint as well as other sources of lead. The members of our Associations are concerned that the proposed rule will have significant negative impacts on the housing community. The most negative impact will be most acutely felt by the category

[54] President's Task Force on Environmental Health Risks and Safety Risks to Children, Federal Action Plan to Reduce Childhood Lead Exposures and Associated Health Impacts, at 3 (Dec. 2018), https://www.epa.gov/sites/default/files/2018-12/documents/fedactionplan_lead_final.pdf.

[55] Proposed Rule at 50455.

of people EPA seeks to protect by amending the dust-lead levels: children and people living in target housing in communities with environmental justice concerns. Just under half of all apartments in buildings with five or more units were built in 1979 or earlier according to NMHC tabulations of the 2021 American Community Survey microdata.[56]

There are several negative impacts on the communities EPA seeks to protect through the proposed rule. Lack of housing availability, stability, and affordability have severe negative effects on physical and mental health.[57] Studies have shown that children who have experienced multiple moves or homelessness are more likely to develop various health conditions, including mental illnesses, respiratory conditions, and infections.[58] EPA acknowledged these negative effects on the housing market in its proposal and requested information and comment on whether adoption of the proposed DLHS and DLCL under consideration would lead to an increase in housing insecurity and lead exposure.[59] Health-based effects are not only the direct negative health effects that result from exposure to dust-lead from windowsills and floors but, as illustrated above, include the negative health effects from the lack of stable and affordable of housing.

EPA's economic analysis[60] insufficiently accounts for the impact on small businesses with housing in affected communities. With the lower DLCL, the cost of abatements will certainly rise, possibly to prohibitive levels for some small businesses. This would foreclose currently available housing opportunities. According to the information available to our members, the burden of these increased costs is underestimated by EPA. EPA notes that the proposed DLCLs would require instrumentation that would increase both costs and turnaround

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[56] NMHC, Apartment Stock: When Were Apartments Built?, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-data-download/ (last updated Nov. 2022).

[57] See infra note 3.

[58] Lauren E. Gultekin *et al.*, *Health Risks and Outcomes of Homelessness in School-Age Children and Youth: A Scoping Review of the Literature*, 36 The Journal of School Nursing 10 (2019), https://pubmed.ncbi.nlm.nih.gov/31522583/. *See also* HUD Office of Policy Development and Research, Affordable Housing, Eviction, and Health (2021), https://huduser.gov/portal/periodicals/em/Summer21/highlight1.html.

[59] Proposed Rule at 50467.

[60] Economic Analysis.

time placing a greater burned on property owners, housing providers and renters.[61] Our member Associations could work to assist EPA in more accurately assessing the severity of the economic impacts of the proposed dust-lead levels on small businesses and property owners and housing providers generally.

a. Notification Undermines the Statutory Intent of Abatement

EPA's economic analysis does not paint a complete and accurate picture of the economic impacts of the proposed amendments because it does not account for all the relevant ramifications and financial repercussions of an unprecedented non-numeric DLHS under which virtually any and all target housing would present "known lead-based paint hazards."[62] Implementation of the DLCL and DLHS as currently proposed would result in unintended yet great difficulties in many cases for persons residing in target housing or COFs. The notification language must be revised to reflect the benefits of a completed abatement action and reduce the disincentives to property owners and housing providers to participate in federal housing programs including financing challenges.

The proposed changes in the notification requirement for "a non-numeric DLHS that is any reportable level of dust-lead"[63] would create the erroneous expectation by buyers or renters that a non-detectable DLHL is required for any target housing/COF they buy or rent. This notification is triggered for any reportable level, even for levels below the DLCL, after costly and efficient abatement work for windowsills and floors is completed. The difficulty in meeting an "any reportable level" lead standard even when an abatement has been completed will deter property owners and housing providers of buildings that could fall under the extremely broad definition of COF from participating in federal programs.

The increased expenses for abatement and the GTZ DLHS erect a roadblock for property owners and housing providers who want to participate in federal housing programs, which already suffer from scarce supply for both subsidized and market rate renters. The rental market

[61] Proposed Rule at 50462.

[62] Id. at 50445.

[63] *Id.* at 50454.

remains tight.[64] As a general matter, there is a shortage of apartment homes, and the number of affordable units declined considerably over the last decade. More often than not, real estate in the affordable housing category is pre-1979. EPA should ensure that its proposed rule does not disincentivize participation in federal housing programs or it will impair these markets and affect persons living in communities with environmental justice concerns.

In its proposal, EPA notes the relevant parts of the definition of COF as being "buildings or portions of buildings, constructed prior to 1978, in which the same child regularly visits on at least two different days within any given week, with their visits lasting at least three hours with combined visits of at least six hours, and combined annual visits lasting at least 60 hours. COFs may include, but are not limited to, day-care centers, preschools and kindergarten classrooms."[65] Living areas are defined as "any area of a residential dwelling used by one or more children which include, but are not limited to, living rooms, kitchen areas, dens, play rooms, and children's bedrooms."[66] Under the definition it is sufficient to qualify as a COF if one child visits only two days within a week for no more than three hours. These parameters extend the reach of this definition far beyond certified day-care centers, preschools, and kindergartens. The definition could easily apply to private households (such as grandparents) who assist with childcare. Under the amended standards, these individuals might have to find new housing, which could be difficult, and the already scarce availability of places for childcare would further decrease.

Affordable housing is essential for the health and wellbeing of the people living in all communities, including children living in communities with environmental justice concerns. As pointed out previously, EPA should consider the health-based impacts of housing availability, stability, and affordability. By reading the health-based factors to refer narrowly to only the dust-lead levels themselves, EPA would lower one health risk and increase another as a direct consequence.

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[64] NMHC, NMHC Quarterly Survey of Apartment Conditions (July 18, 2023), https://www.nmhc.org/research-insight/quarterly-survey/2023/nmhc-quarterly-survey-of-apartment-conditions-july-2023/.

[65] Proposed Rule at 50465.

[66] *Id.*

The DLHS and DLCL are directly incorporated by reference into certain requirements mandated by HUD. In its Proposal, EPA recognized that "HUD's housing assistance programs play a critical role in helping nearly 5 million households avoid housing insecurity and its harmful effects on physical and mental health. Despite such Federal assistance, the nation faces a critical shortage of affordable rental housing affecting about 8 million very low-income households."[67] EPA further acknowledged that more stringent dust-lead standards or uncertainty as to how to meet those standards could be a disincentive for private target housing providers to participate in HUD's rental assistance programs and the project-based assistance programs.[68]

The negative health effects caused by further decrease in the already insufficient supply of affordable housing[69] would be a direct consequence of EPA's proposed level of detection DLHS for windowsills and floors, a level that is virtually impossible to meet. While dust-lead levels in windowsills and floors are only one exposure pathway in target housing and COF, by making these levels so difficult and onerous to meet, the negative effects are far-reaching. EPA has not complied with the Ninth Circuit majority opinion or its duty to regulate dust-lead levels and protect human health if EPA proposes DLHS that directly cause negative health effects in a different manner. EPA must factor in these negative ramifications in its determination of the appropriate DLCL and DLHS.

b. Impacts on the Biden Administration's Housing Supply Action Plan

In July 2023, the Biden Administration released a statement[70] listing several planned initiatives to increase the supply of available affordable housing as part of its Housing Supply Action Plan. Some of the Administration's initiatives include expanding financing for

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[67] *Id.* at 50466.

[68] *Id.*

[69] The United States needs to build 4.3 million apartments by 2035 to meet the current rental housing demand. Further, underproduction of housing has translated to higher housing costs - resulting in a consequential loss of affordable housing units (those with rents less than $1,000 per month), with a decline of 4.7 million affordable apartments from 2015-2020. Hoyt Advisory Services and Eigen10 Advisors, LLC, Executive Summary: U.S. Apartment Demand Through 2035, at 4 (May 2022), https://www.weareapartments.org/pdf/Executive_Summary.pdf.

[70] The White House, *Biden-Harris Administration Announces Actions to Lower Housing Costs and Boost Supply* (July 27, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/27/biden-harris-administration-announces-actions-to-lower-housing-costs-and-boost-supply/.

affordable, energy efficient and resilient housing and promoting commercial-to-residential conversion opportunities. EPA's proposed amendments of the DLCL and DLHS would likely affect the Administration's initiatives, especially because a significant part of the affordable housing is pre-1979. Similarly, many of the commercial spaces available for conversion to affordable housing are pre-1979 construction, raising questions of the viability of these projects moving forward.

It is likely that few to none of these properties would test below the proposed "any reportable level" DLHS following an abatement, and the buyers/renters would have to be warned that there are lead hazards on the property. Property owners and housing providers might be deterred by these additional complications and may refuse to participate in the Administration's programs. A recent research study by NMHC and the NAHB found that the cost of compliance with government regulation accounts for 40.6% of multifamily development costs.[71] If the developers continue with these projects it often "translates to higher rents and reduced rental housing affordability."[72] Likewise, financing might be more difficult to obtain, or there will be fewer available sources of financing than counted on by the Administration, if an increased number of properties are attested to have lead hazards according to the GTZ DLHS.

c. Financial Lending Considerations that Affect Housing Supply

The proposed dust-lead levels would have an impact on the real estate market. For example, in the secondary mortgage markets, the value of mortgages could decrease because the hazard disclosure statements will be viewed as identifying a risk associated with the properties. The disclosure statement could deter potential tenants who believe that the home presents a hazard.

4. Conclusion

The Association members are concerned that the proposed rule will have significant negative impacts on all aspects of the housing and real estate market, including affordable

[71]NAHB & NMHC, Regulation: 40.6 Percent of the Cost of Multifamily Development, at 3(2022) https://www.nmhc.org/globalassets/research--insight/research-reports/cost-of-regulations/2022-nahb-nmhc-cost-of-regulations-report.pdf.

[72] *Id*. at 9.

housing which would have direct negative health impacts. EPA's economic analysis provides insufficient support to properly assess these negative impacts. The most negative impact would be felt by the category of people EPA seeks to protect by amending the dust-lead levels: children and people living in target housing in communities with environmental justice concerns. Health-based effects are not only the direct negative health effects that result from exposure to dust-lead from windowsills and floors, but also the negative health effects from lack availability, stability, and affordability of housing. A permissible level of exposure to lead from windowsills and floors, while higher than zero, would lower the levels of lead in these exposure pathways, but it would not exacerbate the other housing-related health risk factors. The Associations submit that this would result, in the aggregate, in higher overall health benefits for the categories of people EPA aims to protect with the proposal to amend the dust lead levels.

The Associations would welcome an opportunity to work with EPA to provide additional information relating to the housing market requested by EPA in its proposal. The information would support EPA in determining dust-lead levels that most effectively protect the health of children and people living in target housing in communities with environmental justice concerns.

Sincerely,

National Apartment Association
National Association of Home Builders
National Association of REALTORS®
National Leased Housing Association
National Multifamily Housing Council
The Real Estate Roundtable