

SETTLEMENT AGREEMENT

WHEREAS, on April 22, 2008, the United States Environmental Protection Agency (“EPA” or the “Agency”) published “*Lead; Renovation, Repair, and Painting Program; Final Rule*” in the Federal Register, 73 Fed. Reg. 21692 (April 22, 2008) (the “LRRP Rule”);

WHEREAS, the Sierra Club, the Center for Environmental Health and Linda Kite (hereinafter “Sierra Club Petitioners”) filed a petition for review of the LRRP Rule in the Court of Appeals for the 9th Circuit (Case 08-1193) (“Sierra Club Petition”);

WHEREAS, the New York City Coalition to End Lead Poisoning, Northern Manhattan Improvement Corporation, New York Public Interest Research Group, and Make the Road New York (hereinafter “New York Petitioners”) filed a petition for review of the LRRP Rule in the Court of Appeals for the 2nd Circuit (Case No. 08-1235) (“New York Petition”);

WHEREAS, the National Association of Home Builders filed a petition for review of the LRRP Rule in the Court of Appeals for the District of Columbia (Case 08-1258);

WHEREAS, the petitions for review of the LRRP Rule were consolidated before the Court of Appeals for the District of Columbia;

WHEREAS, in order to avoid protracted and costly litigation, the Sierra Club Petitioners, the New York Petitioners (hereinafter referred to together as “Public Interest Petitioners”), and EPA wish to implement this Settlement Agreement;

NOW THEREFORE, the Public Interest Petitioners and EPA agree as follows:

GENERAL PROVISIONS

1. The parties to this Settlement Agreement (“Agreement”) are the Public Interest Petitioners and EPA (the “Parties”). Nothing in this Agreement shall be construed to make any

other person or entity not executing this Agreement a third-party beneficiary to this Agreement.

2. This Agreement applies to, is binding upon, and inures to the benefit of the Public Interest Petitioners (and their successors, assigns, and designees) and EPA.

3. This Settlement Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it.

4. Within fourteen (14) days after the Effective Date of this Agreement, the Parties shall notify the court of this Agreement and request that the Sierra Club Petition and the New York Petition be held in abeyance pending completion of, and subject to, the terms of this Agreement.

5. Any deadline stated herein that falls on a Saturday, a Sunday, or a legal holiday shall be extended to the next day which is not one of the aforementioned days.

EPA ACTIONS

6. **The “Opt-Out Proposal.”**

a. On or before October 20, 2009, EPA agrees to sign a Notice of Proposed Rulemaking that would propose to amend the LRRP Rule (“Opt-out Proposal”). EPA agrees that the Opt-out Proposal will include, at a minimum, the following elements:

- (1) A proposal to remove the provision regarding the applicability of the work practice requirements currently found at 40 C.F.R. § 745.82(c).

- (2) A proposal to require that renovation firms provide owners and occupants a post-renovation notification that will include information regarding the work practices utilized by the renovator as well as any sampling or testing results.
- b. EPA agrees to take final action on the Opt-Out Proposal, which may include signature of a final rule by the Administrator of EPA, on or before April 22, 2010.

7. **The “Clearance Proposal”**

- a. On or before April 22, 2010, EPA agrees to sign a Notice of Proposed Rulemaking that would propose to amend the LRRP Rule (“Clearance Proposal”). EPA agrees that the Clearance Proposal will, at a minimum, include the following elements:
 - (1) A proposal to require dust wipe sampling on uncarpeted surfaces in certain circumstances. Specifically, the Clearance Proposal will include a proposal to require dust wipe sampling in the work area after: (i) use of a heat gun at temperatures below 1100 degrees; (ii) removal or replacement of window(s) or door frame(s); (iii) scraping an area of 60 ft² or greater; and (iv) removal of more than 40 ft² (or equivalent in a linear foot extrapolation) of trim or molding.
 - (2) A request for comment on whether EPA should require clearance in any or all of the circumstances in which EPA proposes to

require dust wipe sampling. For purposes of this Agreement, clearance means demonstrating that dust lead levels on uncarpeted surfaces in the work area are below those set forth in 40 C.F.R. 745.65(b) and includes an exception or alternative provision for addressing situations where achieving lead levels below the levels set forth in 40 C.F.R. 745.65(b) would require expanding the scope of the renovation job.

- (3) A request for comment on whether the proposed threshold (60 ft²) for dust wipe sampling after scraping should be lowered to 6 ft² and whether EPA should require clearance.
- (4) A request for comment on whether the proposed threshold (40 ft²) for dust wipe sampling after the removal of trim or molding should be lowered to less than 40 ft² and whether EPA should require clearance.
- (5) A request for comment on whether the EPA should require dust wipe sampling in situations where the final wet disposable cleaning cloth used for cleaning verification pursuant to 40 CFR 745.85(b)(1) does not match the cleaning verification card.
- (6) A proposal to require clearance after: (i) use of machines that disturb lead-based paint through high speed operation such as sanding, grinding, power planing, needle gun, abrasive blasting, or sandblasting used with HEPA exhaust control; and (ii) demolition

or removal of plaster over 6 ft².

(7) A request for comment on whether to require clearance after renovation activities in rental properties in situations where EPA proposes to require dust wipe sampling pursuant to Paragraph 7.a.(1) if the renovator has been informed that such activities are being performed to remedy a violation or comply with an order (such as an order to correct building code violations) issued by any local or state governmental authority. In connection with this request for comment, EPA will also request comment on whether the renovator should be obligated to affirmatively ask owners and occupants of rental property whether the renovation activity is being performed to comply with an order issued by any local or state governmental authority and must indicate in the post-renovation notice whether the renovator was informed that the renovation was performed for such reason.

(8) A request for comment on whether EPA should expand the scope of any proposed clearance requirement to scenarios beyond what is proposed.

b. EPA agrees to take final action on the Clearance Proposal, which may include signature of a final rule by the Administrator of EPA, on or before July 15, 2011.

c. Subject to the following conditions, EPA may in its sole discretion extend the deadline in Paragraph 7.b. by four months or less:

(1) EPA must provide notice to the Public Interest Petitioners at least ten (10) days before the deadline, advising the Public Interest Petitioners of the new date by which EPA shall take final action on the Clearance Proposal, and explaining EPA's basis for invoking the provisions of this Paragraph.

(2) This procedure may be used multiple times, but in no event may the deadline set in Paragraph 7.b. be extended by means of this Paragraph 7.c. by more than a total of four months.

8. **Non-residential Buildings.**

a. **Non-residential Buildings ANPR**

(1) On or before April 22, 2010, EPA agrees to sign an Advanced Notice of Proposed Rulemaking ("ANPR") regarding EPA's intention to:

(a) Propose work practice standards applicable to renovation activities on the exterior of public buildings constructed before 1978 and commercial buildings ("Non-residential Buildings"); and

(b) Evaluate whether renovation activities in the interior of Non-residential Buildings create lead-based paint hazards and, if so, propose work practice standards applicable to

such renovation activities in the interior of Non-residential Buildings.

b. **The “Exterior Proposal”**

(1) On or before December 15, 2011, EPA agrees to sign a Notice of Proposed Rulemaking that will include proposed work practice standards applicable to renovation activities on the exteriors of Non-residential Buildings (“Exterior Proposal”).

(2) EPA agrees to take final action on the Exterior Proposal, which may include signature of a final rule by the Administrator of EPA, on or before July 15, 2013.

(3) Subject to the following conditions, EPA may in its sole discretion extend the deadlines in Paragraphs 8.b.(1) and (2) by four months or less:

(a) EPA must provide notice to the Public Interest Petitioners at least ten (10) days before the deadline, advising the Public Interest Petitioners of the new date by which EPA shall take the action described in Paragraph 8.b.(1) or 8.b.(2), and explaining EPA’s basis for invoking the provisions of this Paragraph.

(b) This procedure may be used multiple times, but in no event may the deadline set in either Paragraph 8.b.(1) or 8.b.(2) be extended by means of this Paragraph 8.b.(3) by more

than a total of four months.

c. **The “Interior Proposal”.**

- (1) On or before September 30, 2011, EPA agrees to seek advice from the EPA Scientific Advisory Board (“SAB”) regarding a risk assessment methodology used to support the development of a lead-based paint hazard standard for Non-residential Buildings. EPA will provide the Public Interest Petitioners with a copy of the report from the SAB (“SAB Report”).
- (2) Unless EPA notifies Petitioners that it has concluded that renovation activities in the interior of Non-residential Buildings do not create lead-based paint hazards, EPA agrees to sign, on or before the date that is eighteen months after receiving the SAB Report (“Interior Proposal Date”), a Notice of Proposed Rulemaking that will propose work practice standards applicable to renovation activities that create lead-based paint hazards in the interiors of Non-residential Buildings (“Interior Proposal”). The Interior Proposal may be combined with the Exterior Proposal into one rulemaking proposal.
- (3) On or before the date that is eighteen months after the Interior Proposal is published in the Federal Register, EPA agrees to take final action on the Interior Proposal, which may include signature of a final rule by the Administrator of EPA.

- (4) Subject to the following conditions, EPA may in its sole discretion extend the deadlines in Paragraphs 8.c.(2) and (3) by up to two years, if EPA concludes that additional studies should be conducted or additional information should be gathered to complete the Interior Proposal or establish a hazard standard for the interiors of Non-residential Buildings.
- (a) EPA must provide notice to the Public Interest Petitioners within 60 days of receiving the SAB Report, advising the Public Interest Petitioners of the new date by which EPA shall take the action described in Paragraph 8.c.(2) or 8.c.(3) and explaining EPA's basis for invoking the provisions of this Paragraph.
- (b) Thereafter, the new date may be further extended provided that EPA must provide notice to the Public Interest Petitioners at least ten (10) days before the deadline, advising the Public Interest Petitioners of the new date by which EPA shall take the action described in Paragraph 8.c.(2) or 8.c.(3) and explaining EPA's basis for such further extension.
- (c) The procedure in this Paragraph 8.c.(4) may be used multiple times, subject to the following conditions:
- i) In no event may the date set in Paragraph 8.c.(2) or

in 8.c.(3) be extended by means of this Paragraph
8.c.(4) by more than a total of two years.

(5) Additionally, subject to the following conditions, EPA may in its sole discretion extend the deadlines in Paragraphs 8.c.(2) and (3) by four months or less (even if extended pursuant to Paragraph 8.c.(4)):

- (a) EPA must provide notice to the Public Interest Petitioners at least ten (10) days before the deadline, advising the Public Interest Petitioners of the new date by which EPA shall take the action described in Paragraph 8.c.(2) or 8.c.(3) and explaining EPA's basis for invoking the provisions of this Paragraph.
- (b) This procedure may be used multiple times, but in no event may the deadline set in either Paragraph 8.c.(2) or 8.c.(3) be extended by means of this Paragraph 8.c.(5) by more than a total of four months.

MODIFICATION AND REMEDIES

9. In addition to the modification provisions in Paragraphs 7 and 8 above, the parties may modify any deadline or other term of this agreement in writing.

10. If EPA fails to take action as set forth in Paragraphs 6 through 8, the Public Interest Petitioners' sole remedy under this Agreement shall be the right to ask the court to lift the abeyance and establish a schedule for further proceedings with regard to the Public Interest

Petitioners' claims concerning the matters identified in Paragraphs 6-8 of this Settlement Agreement as to which EPA failed to act.

11. The United States does not waive or limit any defense relating to this litigation if the stay is lifted. The Parties specifically agree that contempt of court is not an available remedy under this Settlement Agreement.

12. The Public Interest Petitioners' sole remedy concerning any issue relating to any final action taken pursuant to Paragraphs 6 through 8 is to challenge such final action under Section 19 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2618. Nothing in this Settlement Agreement shall be construed to limit any defenses EPA may have to any such challenge or action.

ATTORNEYS' FEES, DISMISSAL, WAIVER AND SAVINGS PROVISIONS

13. The Parties agree that, pursuant to 15 U.S.C. § 2618(d), Public Interest Petitioners are entitled to an award of costs of suit (including reasonable attorneys' fees) ("Costs") for work performed in connection with the litigation through the date of this Settlement Agreement. Public Interest Petitioners are entitled to such an award in an amount to be determined either by settlement or by the Court. In the event that the Parties are unable to reach a settlement, Public Interest Petitioners may file a motion for Costs with the Court; however, any such motion must be filed within 180 days of this matter being placed in abeyance. Any award of Costs pursuant to this Paragraph 13, whether by settlement or by the court, shall constitute a full and final resolution of Public Interest Petitioners' claim for Costs in this matter; provided, however, that if EPA fails to take action as set forth in Paragraphs 6 through 8 and Public Interest Petitioners succeed in lifting the abeyance pursuant to Paragraph 10, Public Interest Petitioners may seek to

recover Costs for additional work performed in any reactivated proceedings.

14. Within 30 days of EPA's completion of the actions specified in Paragraphs 6-8 above, the Public Interest Petitioners shall dismiss their petitions with prejudice pursuant to Fed. R. App. Pro. 42.

15. This Settlement Agreement constitutes a full and final resolution of all matters related to the Public Interest Petitions. Public Interest Petitioners agree to release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of EPA in an existing action or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they may have had, or may now or hereafter have, against the United States based upon matters related to their Petitions.

16. Nothing in Paragraphs 14 or 15 shall preclude Public Interest Petitioners from bringing a legal challenge to a final action taken pursuant to Paragraphs 6 through 8 as provided in Paragraph 12.

17. Nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded to EPA by TSCA, or by general principles of administrative law, nor shall it in any way be deemed to limit EPA's discretion in adopting any final rule.

18. Nothing in this Settlement Agreement shall be construed to limit or modify EPA's discretion to alter, amend or revise any regulations, guidance, or interpretation EPA may issue in accordance with or on matters related to this Settlement Agreement from time to time or to promulgate or issue superseding regulations, guidance, or interpretations, or to limit any right that Public Interest Petitioners may have to seek judicial review in a subsequent case of any such action by EPA.

19. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or take actions in contravention of the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, TSCA, or any other law or regulation, either substantive or procedural.

20. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the schedule established in Paragraphs 6 through 8. Such situations include, but are not limited to, a government shut-down such as occurred in 1995 and 1996, or catastrophic environmental events requiring immediate and/or time-consuming response by EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth herein shall not constitute a failure to comply with the terms of this Settlement Agreement, and any deadlines shall be extended one day for each day of the delay. EPA will provide the Public Interest Petitioners with notice as soon as is reasonably possible under the circumstances in the event that EPA invokes this term of the Settlement Agreement and will provide Public Interest Petitioners with an explanation of EPA's basis for invoking the provisions of this Paragraph. The provisions of this Paragraph shall not limit Public Interest Petitioners' right to petition the Court to lift the stay pursuant to Paragraph 10, except that the court may take any delays described by this Paragraph into account in determining whether the conditions for lifting the stay have been met.

NOTICE

21. Any notices required or provided for by this Agreement shall be in writing, and shall be deemed effective (i) upon receipt if sent by U.S. Post or (ii) upon the date sent if sent by

overnight delivery, facsimile, or email. In addition, to be effective, any such notice must be sent to the following:

For Public Interest Petitioners:

Thomas Neltner
1701 Tilton Dr.
Silver Spring, MD 20902
Telephone number: 317-442-3973

Fax number: 866-234-8505
email: neltner@ikecoalition.org

Matthew Chachère
Northern Manhattan Improvement Corporation Legal Services
76 Wadsworth Avenue
New York, NY 10033
Telephone number: 212-822-8300

Fax number: 212-740-9645
email: matthewchachere@nmic.org

For Defendants:

Andrew Simons, Attorney,
Pesticides and Toxic Substances Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW.
MC- ARN 2333A
Washington, D.C. 20460
Telephone: (202) 564-3649

Fax number: 202-564-5442
email: simons.andrew@epa.gov

Angeline Purdy
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
Telephone: (202) 514-0996

Attn: DJ # 90-5-2-4-16726

Fax number: (202) 514-8865
Email: Angeline.purdy@usdoj.gov

or such other person as either party may subsequently identify in writing to the other party.

MISCELLANEOUS

22. By signature below, the Public Interest Petitioners and EPA consent to the filing of this Settlement Agreement in the D.C. Circuit. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized by the Party to enter into and execute the terms and conditions of this Settlement Agreement, and to legally bind such Party to this Settlement Agreement.

23. The various terms, paragraphs, and sections contained herein shall be deemed separable and severable. If any provision of this Settlement Agreement is deemed invalid or unenforceable, the balance of the Settlement Agreement shall remain in full force and effect.

24. This Settlement Agreement is the entire agreement between the Public Interest Petitioners and EPA in this case. All prior conversations, meetings, discussions, drafts and writings of any kind are specifically superseded by this Settlement Agreement.

25. It is hereby expressly understood and agreed that this Settlement Agreement was

jointly drafted by the Public Interest Petitioners and EPA. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

26. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

For Sierra Club Petitioners:

Date: _____

Thomas Neltner
1701 Tilton Dr.
Silver Spring, MD 20902

For New York Petitioners

Date: _____

Matthew Chachère
Northern Manhattan Improvement Corporation Legal
Services
76 Wadsworth Avenue
New York, NY 10033

For Defendant:

Date: _____

Angeline Purdy, Trial Attorney
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026
202-514-3785

For Sierra Club Petitioners:

Date: 8/22/09



Thomas Neltner
1701 Tilton Dr.
Silver Spring, MD 20902

For New York Petitioners

Date: _____

Matthew Chachère
Northern Manhattan Improvement Corporation Legal
Services
76 Wadsworth Avenue
New York, NY 10033

For Defendant:

Date: _____

Angeline Purdy, Trial Attorney
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026
202-514-3785

For Sierra Club Petitioners:

Date: _____

Thomas Neltner
1701 Tilton Dr.
Silver Spring, MD 20902

For New York Petitioners

Date: Aug 21, 2009

Matthew Chachère
Matthew Chachère
Northern Manhattan Improvement Corporation Legal
Services
76 Wadsworth Avenue
New York, NY 10033

For Defendant:

Date: _____

Angeline Purdy, Trial Attorney
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026
202-514-3785

For Sierra Club Petitioners:

Date: _____

Thomas Neltner
1701 Tilton Dr.
Silver Spring, MD 20902

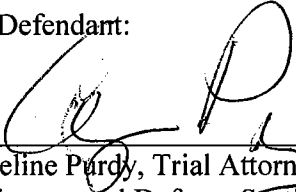
For New York Petitioners

Date: _____

Matthew Chachère
Northern Manhattan Improvement Corporation Legal
Services
76 Wadsworth Avenue
New York, NY 10033

For Defendant:

Date: 8/24/09



Angeline Purdy, Trial Attorney
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