



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

WASHINGTON, DC 20410-0500

November 23, 2004

GENERAL COUNSEL

Mr. Eric Olson
Senior Attorney
Natural Resources Defense Council
Suite 400
1200 New York Avenue, NW
Washington, DC 20005

Dear Mr. Olson:

This responds to the petition for rulemaking¹ that was submitted to HUD's Rules Docket Clerk on September 7, 2004, by the Natural Resources Defense Council (NRDC), Alliance for Healthy Homes, Business and Professional People for the Public Interest, Children's Environmental Health Network, Citizens for a Better Environment, National Center on Poverty Law, Safer Pest Control Project, and West Harlem Environmental Action. The petition proposes that HUD amend its rules governing public housing agencies (PHAs) – and, more specifically, the "PHA Plan" mandated by Section 5A of the U.S. Housing Act – to require PHAs to describe in their Plans: (1) their policy implementing the Integrated Pest Management (IPM) techniques endorsed by Congress in 1996 in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); and (2) the "specific steps taken to reduce, to the maximum extent possible, reliance on chemical pesticides while providing long term pest control and eliminating pest infestation." Petition, p. 18. After closely reviewing this petition, the Secretary finds, pursuant to 24 C.F.R. 10.20(b), that the course of action advocated in the petition is not adequately justified. The grounds for this decision are briefly stated below.

FIFRA requires that federal agencies "use [IPM] techniques in carrying out pest management activities"² and "promote [IPM] through procurement and regulatory policies, and other activities." 7 U.S.C. 136r-1. As the petition notes, IPM is defined in the same section of

¹ Though the petition (p. 5) indicates that it is filed "[p]ursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. 553(e)," HUD's regulation of public housing is a "matter relating to . . . loans, grants, benefits, or contracts" to which section 553 of the APA does not apply. See 5 U.S.C. 553(a)(2). However, because members of the public may file petitions for rulemaking pursuant to a regulatory provision independently promulgated by HUD (see 24 C.F.R. 10.20 (2004)), HUD has considered the petition under that authority.

² To the extent that the petition (pp. 5, 16-17) briefly asserts that HUD "carries out" pest management activities in public housing, the petition is in error, as it presumes a degree of legal and practical control over day-to-day PHA operations that HUD does not in fact possess. Moreover, any concomitant request that HUD take action with regard to HUD's alleged public housing "operations" other than via the issuance of regulations is beyond the scope of a petition for rulemaking and will not be addressed further herein.

FIFRA as “a sustainable approach to managing pests by combining biological, cultural, physical and chemical tools in a way that minimizes economic, health, and environmental risks.” Given HUD’s expressed mission to promote a “suitable living environment” – one that is safe and healthy – for all families that benefit from HUD assistance, HUD strongly supports the tenets of IPM and would do so even if FIFRA did not require HUD to promote IPM techniques.

The petition correctly observes that no HUD regulation currently mandates a PHA’s use of IPM techniques and that the only codified HUD regulation that expressly addresses pest control techniques is 24 C.F.R. 903.7(e), a provision of the PHA Plan regulation. That provision requires a PHA’s annual plan to include, as part of the PHA’s statement of its operation and management, “a description of any measures necessary for the prevention or eradication of pest infestation.” 24 C.F.R. 903.7(e)(2). The petition asserts that, in order to be compliant with FIFRA, that regulation must be modified to require that a PHA evidence its adoption of IPM techniques as its pest infestation measures and indicate the specific steps it has taken to implement IPM techniques.

However, the petition’s assertion in this regard is incorrect as a matter of law. FIFRA requires that HUD promote IPM techniques in its regulatory policies – not that HUD require IPM techniques in its codified regulations. In many instances in the U.S. Housing Act and in other laws, Congress has expressly directed HUD to issue notice-and-comment regulations to require PHAs to take certain actions; however, FIFRA contains no such directive. Rather, consistent with the fact that Congress has required HUD to “promote”, not require, the use of IPM techniques, FIFRA charges HUD to engage in such promotion via the vehicles through which HUD typically sets forth “regulatory policy” – vehicles that do not carry the presumptive legally binding effect that notice-and-comment rules do. HUD promulgates such policies through handbooks, guidebooks, pamphlets, and other materials that, while not codified in the Code of Federal Regulations, are sent directly to PHAs or made available to PHAs on HUD’s website or through other means. Several of such regulatory policy documents that relate to the use of IPM techniques by PHAs are cited in the enclosed December 1, 2003, response of HUD to a petition for rulemaking filed last year by the Attorneys General of several states and the United States Virgin Islands.

HUD, therefore, is not compelled by law to require PHAs to use IPM techniques. However, even if HUD did seek to regulate regarding this matter, the petitioners should be advised that HUD would not necessarily adopt the approach advocated in the petition. For example, HUD would certainly have the discretion to contemplate a regulation that requires PHAs to merely consider the use of IPM techniques. Such a regulation would arguably be (1) more consistent with HUD’s role as “promoter” than the regulation that the petition advocates; (2) more justified in light of the competing PHA – and HUD – concern of rapid response to public housing tenants’ complaints of pest infestation; and (3) more capable of competent HUD monitoring and enforcement.

HUD also might want to engage in certain preliminary activities before embarking on the issuance of any proposed IPM notice-and-comment regulation, no matter what its substance was. For example, HUD might first attempt to determine the extent to which PHAs across the country are not already using, or at least considering the use of, IPM techniques. If that inquiry revealed that some PHAs had not considered using IPM methods, HUD might also first want to pursue initiatives to acquire the voluntary agreement of PHAs to either use, or consider using, IPM techniques.

Finally, HUD notes that, even if it did seek to issue a codified regulation regarding IPM use by PHAs, HUD would not include that regulation in 24 C.F.R. Part 903 – HUD's PHA Plan regulations – as the petition advocates. The purpose of the PHA annual plan regulation at 24 CFR 903.7 is to ensure that HUD receives: (1) the information PHAs are required by statute to include in their annual PHA Plans, including most notably information on how PHAs intend to use their HUD formula grant capital and operating funds; and (2) certain information describing any management or operational problems that the PHAs face and how the PHAs intend to address those problems. As Part 903 currently acknowledges, pest control would be such a problem – especially if cited by HUD as a PHA deficiency in the Public Housing Assessment System process – and IPM techniques could well be part of a plan to address that problem. However, those techniques would not be the only option in dealing with the problem. Therefore, any new, substantive requirements on PHAs regarding IPM, were HUD to impose them, would be inconsistent with the purpose of Part 903 and Section 5A(d)(5) of the U.S. Housing Act of 1937, 42 U.S.C. 1437c-1(d)(5).

For these reasons, the Secretary has concluded that the petition advocates a course of action that HUD does not choose to pursue. However, HUD reiterates its fundamental commitment to IPM practices, which is evidenced by the actions and initiatives on the part of HUD that are detailed in the attached letter. Those actions and initiatives reflect HUD's recognition of the importance of IPM and demonstrate that HUD has, as the statute requires, promoted IPM practices in its regulatory policies and other actions. HUD will continue to so promote IPM practices and very much appreciates the NRDC's offer to work with HUD in advancing this endeavor.

Thank you for your interest in HUD's public housing programs. If you have further questions regarding this matter, please contact Aaron Santa Anna, Assistant General Counsel for Regulations, Office of General Counsel, (202) 708-3055.

Sincerely,



Kathleen D. Koch
Acting General Counsel

Enclosure