

# New Lead Paint Disclosure and Waste Disposal Rules

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Lead-based paint may be old, but it's the subject of significant new legislation. Two sets of regulations went into effect this year and more have been proposed.

Since the passage of the Residential Lead-Based Paint Hazard Reduction Act of 1992,<sup>1</sup> the federal Environmental Protection Agency (EPA) has had to take a number of regulatory actions to reduce the risks posed by lead-based paint (LBP). The regulations that EPA has promulgated impose obligations on a variety of persons who own, lease, or manage residential property. This article discusses new LBP regulations that went into effect on June 1, 1999, and a rule that EPA recently proposed which would create new requirements for the management and disposal of building debris that contains LBP.

## BACKGROUND

From the turn of the century through the 1970s, lead was an important ingredient in oil-based exterior and interior paints. The presence of lead in paint can cause a variety of health problems and can be particularly damaging to children, fetuses, and women of childbearing age. Because of the risk of lead exposure to children, the Consumer Product Safety Commission banned the use of LBP in residential properties in 1978.

Despite the LBP ban, the Department of Housing and Urban Development has estimated that more than half of the nation's housing built before 1980 (approximately 64 million dwellings)

still contains LBP and that 5 to 15 million housing units may be exposing their occupants to LBP hazards. The Centers for Disease Control and Prevention has estimated that approximately 900,000 children under the age of six may have unacceptably high levels of lead in the blood.

Many of these buildings are located in low-income urban areas. In these buildings, children under six may ingest paint chips from flaking walls, windows, doors, and stairways. Dust created by the normal wear of paint around windows and doors can cause an invisible film over surfaces in a residence. Lead can also flake off from exterior walls, porches, and fences or leach into the soils around the outside of a house and contaminate children's play areas.

In 1996, the EPA issued its Lead Paint Disclosure Rule which required lessors and sellers of certain housing to provide tenants or purchasers with all known information regarding the presence of LBP.<sup>2</sup> These disclosure obligations were only triggered by the sale or lease of target housing. The rule did not require disclosure of new information that a lessor became aware of during the term of a lease though the information would have to be disclosed if the lease were renewed.

The 1996 rule also did not address activities such as scraping, sanding, or using a heat gun on surfaces containing LBP, which can release large amounts of lead-contaminated dust and fumes. In addition, lead dust from renovation activities can remain in a home long after the renovation work has been completed. As a result, EPA proposed a

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Pre-Renovation Lead Information Rule (PLIR) in 1994 and issued the final rule in 1998.<sup>3</sup> Under the PLIR, owners and occupants of certain housing must be provided with information about the potential hazards posed by LBP prior to the commencement of renovation activities. The PLIR requirements went into effect on June 1, 1999.

LBP abatement work frequently generates debris that may be considered a hazardous waste under the federal Resource Conservation and Recovery Act (RCRA).<sup>4</sup> Indeed, in *Duckworth v. Barrios*,<sup>5</sup> a landowner was allowed to maintain a private RCRA 7002 action against a neighbor after paint chips that were removed from a neighbor's

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house contaminated the plaintiff's property. Because EPA is concerned that the costs to comply with the RCRA waste identification, management, and disposal requirements are reducing the number of residential LBP abatements, EPA also recently proposed new regulations governing the management and disposal of LBP debris. The proposed LBP debris rule would supplant the application of RCRA hazardous

waste management rules for certain kinds of LBP debris. EPA believes the alternative LBP management standards will be less burdensome than the RCRA hazardous waste management requirements and will increase the number of LBP abatements.

#### ACTIVITIES COVERED BY THE PLIR

Like the 1996 LBP disclosure rule, PLIR applies only to "target housing." This term generally includes all residential dwellings, including apartment buildings, constructed prior to 1978. Excluded from the definition of "target housing" are residences such as studio apartments where the living area is unseparated from the sleeping area, and residences for the elderly and disabled unless there are children under six years of age living in these residences.<sup>6</sup>

Renovation is defined to include any modification to a structure or a portion of a structure that will disturb painted surfaces. The PLIR included a nonexhaustive list of activities that would be considered renovation, such as:

- removal or modification of painted surfaces or components such as doors

- preparation of surfaces such as sanding or scraping;
- removal of large structures such as walls, ceilings, major replumbing or large surface replastering; and
- window replacement.<sup>7</sup>

However, the PLIR does not apply to minor repair or maintenance activities such as minor electrical or plumbing work which disturb less than two square feet of painted surfaces per component and renovation activities at target housing where a written determination has been made by a certified lead paint inspector that the particular components or surfaces subject to the renovation are free of LBP. Also excluded from the PLIR are approved LBP abatement measures as well as emergency renovation operations.<sup>8</sup> The purpose of this exception is to allow building owners to quickly respond to public health hazards or sudden threats of significant property damage to address non-routine or unexpected equipment or structural failures.

It should be noted that the PLIR is not limited to renovation work performed inside a building. The painting of building exteriors and outside playground equipment may also trigger the PLIR requirements if more than two square feet of LBP is to be disturbed.

#### WHO MUST COMPLY WITH THE PLIR DISCLOSURE REQUIREMENTS

A renovator is considered anyone who performs a renovation for compensation.<sup>9</sup> Thus, this term can apply to a plumber, electrician, drywaller, or painter if the work involves disturbing more than two square feet of LBP in target housing. Maintenance workers retained by the owner of a building will not be considered renovators when performing minor repairs and maintenance. However, the PLIR will apply to building owners who use maintenance staff to perform covered renovation activities. EPA also includes within the definition of renovator anyone who performs services in exchange for other services (e.g. bartering). Thus, a neighborhood handyman who performs renovations in exchange for goods or services other than money would be subject to the PLIR.

Interestingly, the definition of renovator in the proposed rule had contained the phrase "renovation of target housing or public buildings." This phrase was deleted from the PLIR. One basis EPA

gave for used for deleting this phrase was that it might consider expanding the PLIR in the future to include public and commercial buildings built before 1978.<sup>10</sup>

#### **PLIR DISCLOSURE REQUIREMENTS FOR RENOVATION ACTIVITIES IN DWELLING UNITS**

When the renovation work is to be performed in a residential unit, the renovators must provide the owner or occupant with a copy of the lead hazard information pamphlet prepared by EPA and entitled *Protect Your Family From Lead in Your Home*. If a state where the building is located has developed a LBP pamphlet that has been approved by EPA, the renovator may use that state pamphlet. Complete reproductions of the EPA or EPA-approved state pamphlet may be used.<sup>11</sup>

The pamphlet must be given to the owner of the dwelling no more than 60 days before beginning the renovation work.<sup>12</sup> In addition, the renovator must obtain a written acknowledgement from the owner/occupant that it has received the pamphlet prior to the start of the renovation work.<sup>13</sup>

The pamphlet may be delivered by the renovator or its designated representative such as a landlord. However, if the renovator uses a representative to deliver the pamphlet, the renovator will remain responsible for complying with the PLIR requirements.<sup>14</sup>

The PLIR provides the renovator with a number of options for delivering the pamphlet. The renovator may serve the pamphlet on the owner and have the owner execute the certification. Alternatively, the renovator may deliver the pamphlet by mail provided the renovator obtains proof of mailing and the pamphlet is served at least seven days before the work is to be commenced.<sup>15</sup>

When the residence is occupied by a tenant and not the owner, the renovator must provide an adult occupant with the pamphlet and obtain an executed acknowledgement. If an adult is not available or refuses to execute the written acknowledgment, the PLIR requires the renovator to physically deliver the pamphlet to the residence and then to record the time, date, address, method of delivery, and the reason why the renovator was unable to obtain a written acknowledgement from an adult occupant. The renovator should then prepare a certification containing this information and place the certification in its files. Thus, if a renovator knocks on a door, a child answers, and the renovator determines that an adult is not pre-

sent, the renovator should slip the pamphlet under the door, record the relevant information, and then prepare the certification.

Alternatively, the renovator may mail the pamphlet to the residence at least seven days prior to the start of the work and obtain proof of mailing.<sup>16</sup>

#### **PLIR DISCLOSURE REQUIREMENTS FOR RENOVATION ACTIVITIES IN COMMON AREAS**

There are different prenotification requirements when renovation work is scheduled for common areas of target housing with four or more units. The PLIR defines common areas as the portions of buildings that are accessible to all residents/users including hallways, stairways, laundry and recreational rooms, playgrounds, community centers, and boundary fences.<sup>17</sup>

For renovation activities in common areas, a renovator is required to provide the owner of the building with the pamphlet and obtain an acknowledgement in the same manner as renovations performed on residences.<sup>18</sup> However, the renovator is not required to distribute the pamphlet and obtain an acknowledgement from the occupants of the building. Instead, the renovator must notify each unit within the building individually about the upcoming renovation work. This notice should describe the general nature and locations of the renovation work and contain a statement that LBP may be disturbed, in addition to the anticipated starting and ending dates for the work. The notification requirement may be satisfied by simply slipping a notice under the door of each residence.

The renovator is also required to make the pamphlet available upon request at no charge to the residents. The notice should inform the residents where they can obtain copies of the pamphlet.<sup>19</sup> The renovator is required to maintain and date a statement memorializing how it complied with its requirements to notify building occupants of the planned renovation work.<sup>20</sup>

If the scope, location or timing of the renovation activities in the common areas changes, the renovator will be obligated to provide an updated notification to residents informing them of the changes. This additional notification must be delivered before the renovator initiates any work that

**Failure to comply with the provisions of the PLIR could subject parties to civil penalties of up to \$25,000 per violation.**

goes beyond that disclosed in the initial notification.<sup>21</sup>

As with renovation activities performed in residences, the renovator's notification obligations can be performed by the owner of the building or another designated representative. However, the renovator will remain liable for compliance with PLIR requirements.

#### PLIR RECORDKEEPING REQUIREMENTS

Renovators are required to maintain records demonstrating compliance with the PLIR for three years.<sup>22</sup> Records that should be retained include any reports from certified LBP inspectors indicating that the surfaces to be affected by the renovation work are free of LBP, certifications of

attempted deliveries of the pamphlets, statements of compliance with the notification requirements for common areas, and the executed acknowledgment forms.

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#### ENFORCEMENT OF PLIR REQUIREMENTS

The PLIR tracks the penalty provisions set forth in the Residential Lead-Based Paint Hazard Reduction Act of 1992.<sup>23</sup> Failure to comply with the provisions of the PLIR could subject parties to civil penalties of up to \$25,000 per violation. The PLIR also provides for criminal fines of up to \$10,000 per day of violation and imprisonment of up to one year. Regulated entities that refuse to allow EPA representatives to enter premises or inspect records that must be maintained, as required by the PLIR, may also be subject to civil and criminal penalties.

EPA did indicate in the preamble to the PLIR that it would take a common-sense approach to enforcement.<sup>24</sup> For example, depending on the nature of the violation, EPA may first issue a notice of violation without any penalty assessment to let individuals know that they are not in compliance with the PLIR and to provide them with an opportunity to cure the violations. EPA also announced that it is developing an "Enforcement Response Document" for the PLIR.

Many states and some cities have enacted their own lead paint statutes or regulations, which vary in scope. States that adopt their own PLIR that is at least as stringent as the federal program may be authorized to enforce their state program in lieu

of the federal program. Until a state receives such delegation, the PLIR will remain in effect in that state.

#### EPA PROPOSED LBP DEBRIS RULE

Under RCRA, a substance may be considered a hazardous waste if it is listed in the RCRA regulations or exhibits one of the four hazardous waste characteristics: ignitability, reactivity, corrosivity and toxicity. In 1990, EPA promulgated the Toxicity Characteristic Leaching Procedure (TCLP) for determining if a substance exhibits the toxicity characteristic (TC). Under the TC rule, generators of waste must use either their knowledge of the substance or perform the TCLP test on a representative sample of a waste to determine if it exhibits the toxicity characteristic. Because of the high lead content of paints that were used on residences built before 1978, debris generated from demolition, renovation, and remodeling activities as well as from LBP abatement projects sometimes fails the TC rule and must be managed as a hazardous waste.

In December 1998, EPA proposed to temporarily suspend the application of the TC rule for "LBP demolition debris" and architectural component debris resulting from abatement or deleading activities.<sup>25</sup> The proposed rule defines "LBP demolition debris" as any solid material which results from the demolition of target housing, public buildings, or commercial buildings which are coated partially or fully by LBP or to which LBP adheres at the time of demolition.<sup>26</sup> Certain types of LBP wastes such as paint chips and dust from sandblowing operations, sludges, filtercakes, and solvents used to strip LBP will not be covered by the proposed rule. These excluded wastes will have to continue to undergo TC determination. However, even if these LBP wastes are determined to be hazardous wastes, they may still be exempt from the full range of RCRA hazardous waste management requirements if the waste is generated by owners or residents of a building and thereby qualifies for the RCRA "household waste exemption."<sup>27</sup> Likewise, LBP waste may also be exempt from the RCRA management rules if the quantity of waste generated by an abatement activity is less than 220 pounds.<sup>28</sup>

In lieu of managing LBP debris as a hazardous waste, EPA recently proposed alternative management and disposal standards for LBP debris.<sup>29</sup> The proposed rule would apply to any firm or indi-

viduals who generate, store, transport, reuse, reclaim or dispose of LBP debris resulting from demolition, renovation, deleading, or remodeling of target housing as well as public and commercial buildings.<sup>30</sup>

The proposed rule applies to target housing, public housing, and public buildings. However, EPA requested comment on extending the rule to the housing units that are excluded from the definition of target housing such as studio apartments, dormitories, and efficiency apartments because the LBP debris would be identical to the waste generated from target housing.<sup>31</sup>

Under the proposed rule, LBP debris includes solid materials resulting from demolition activities that are coated with LBP as well as LBP architectural component debris (LBPACD) such as windows, doors, molding, etc., generated during abatement, deleading, renovation, or remodeling activities.<sup>32</sup> The LBPACD will become LBP debris as soon as it is separated from the building structure. The term "separated" does not mean taken out of the building. Thus, if doors are detached and stacked inside a building, they will be considered "separated" and would qualify as LBPACD.<sup>33</sup>

However, the proposed rule would not apply to LBP wastes that are likely to have concentrated levels of lead such as LBP chips, dust, blast media, solvents, sludges, and treatment residues when these wastes are generated from nondemolition activities (e.g. abatement or deleading). These wastes would continue to be subject to RCRA requirements unless they qualify for one of the RCRA exemptions.<sup>34</sup> It should be noted that paint chips, dust, and other particulate matter generated during demolition activities will be considered LBP debris and thus subject to the proposed rule.<sup>35</sup> In addition, the salvaging or removal of building components prior to the commencement of demolition, remodeling or renovation activities for resale will also be subject to the rule if it results in the generation of LBP debris.<sup>36</sup>

Under the proposed rule, parties handling LBP debris must comply with certain management standards. The proposed rule did not contain any *de minimis* quantity exception so any amount of LBP debris would be subject to the rule.<sup>37</sup> Generators of LBP debris are responsible for determining if the material contains LBP by either testing the debris, using their knowledge of the waste, or simply assuming that LBP debris is present. Genera-

tors who incorrectly determine that LBP debris is not present will be liable under TSCA for any subsequent violations of the LBP debris management rules.<sup>38</sup>

Homeowners who generate LBP debris as a result of renovation or remodeling that they conduct themselves will not be required to comply with the rule. Homeowners who perform abatement activities will not be responsible for complying with the LBP debris rule unless the housing is occupied by a person who is not a part of the owner's immediate family.<sup>39</sup> Likewise, if a homeowner hires a contractor to perform abatement, renovation, or demolition activities, the contractor will be considered the generator of the LBP debris and will be responsible for complying with the requirements of the rule.<sup>40</sup> Of course, generators of LBP debris that is not covered by the proposed rule (e.g., paint chips, paint dust, treatment sludges, solvents, and residues) will have to make a hazardous waste determination.<sup>41</sup> If the debris is determined to be a hazardous waste, it would be subject to the RCRA hazardous waste management requirements.

The management standards also require that LBP debris may not be stored for more than three days unless the material is kept in a closed receptacle or area with limited access.<sup>42</sup> In no event may LBP be stored for more than 180 days from the date of generation.<sup>43</sup> Generators or transporters who accept LBP debris may not transfer the LBP debris without providing notice to the recipient that the material is LBP debris. Thus, a salvage yard that which sells LBPACD generated by an abatement, renovation, or demolition must provide written notice to any purchaser or user of the LBPACD that the LBPACD is LBP debris. Once the LBPACD is reused, no further notification is required.<sup>44</sup> Copies of the notifications must be retained for three years.

The LBP debris may be disposed at a variety of facilities including construction and demolition landfills, nonmunicipal landfills which are allowed to accept waste from small-quantity generators of

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hazardous waste, and hazardous waste disposal facilities, including landfills and incinerators. LBP debris may not be used as groundcover such as mulch or wood chips or any landscaping, nor may it be used as fill material, roadbed material, or for site leveling purposes.<sup>45</sup> If LBP debris is applied in any of these ways, the parties will be considered to have engaged in the improper disposal of hazardous wastes. Disposal of soil that is contaminated with LBP from residences is not covered by the proposed rule because EPA believes it would be eligible for the RCRA household exemption.<sup>46</sup>

The proposed rule allows the reuse of LBP debris such as architectural components or decorative pieces for historic preservation or when homeowners wish to use hard-to-find doors, windows, etc., provided the LBP debris does not contain deteriorated LBP.<sup>47</sup> If so, the LBP would first have to be removed or encapsulated before the LBP debris may be reused. Antique dealers or salvagers who sell LBP debris with deteriorated LBP would be in violation of the proposed rule. Likewise, generators and transporters of LBP debris as well as the owners or operators of facilities that accepted LBP debris may not transfer LBP debris to entities such as antique dealers who intend to reuse or offer it for reuse if the LBP debris has deteriorated paint.<sup>48</sup>

#### CONCLUSION

EPA has devoted considerable resources to reducing the risks posed by LBP. Given the Agency's extensive outreach and the fact that regulated entities had a year to familiarize themselves with the requirements of the PLIR, it is likely that EPA will commence an enforcement initiative that will focus on the records maintained by regulated entities. Following the effective date of the 1996 LBP Disclosure Rule, EPA sent inspectors out to the offices of real estate managers and owners to verify compliance. To avoid the assessment of fines and penalties, parties subject to the PLIR should

pay particular attention to the recordkeeping requirements of the PLIR and maintain adequate documentation of compliance with the rule. ■

#### NOTES

<sup>1</sup> Pub. L. 102-550.

<sup>2</sup> 61 Fed. Reg. 9064 (Mar. 6, 1996).

<sup>3</sup> 63 Fed. Reg. 29,908 (June 1, 1998).

<sup>4</sup> 42 USC §§ 6901 et seq.

<sup>5</sup> *Duckworth v. Barrios*, 1995 WL 241841 (ED La. Apr. 25, 1995).

<sup>6</sup> 40 CFR § 745.103.

<sup>7</sup> 40 CFR § 745.83.

<sup>8</sup> 40 CFR § 745.82.

<sup>9</sup> 40 CFR § 745.83.

<sup>10</sup> 63 Fed. Reg. at 29,912.

<sup>11</sup> 40 CFR § 745.83.

<sup>12</sup> 40 CFR § 745.85.

<sup>13</sup> 40 CFR § 745.88.

<sup>14</sup> 63 Fed. Reg. at 29,914.

<sup>15</sup> 40 CFR § 745.85(a)(1).

<sup>16</sup> 40 CFR § 745.85(a)(2).

<sup>17</sup> 63 Fed. Reg. at 29,911.

<sup>18</sup> 40 CFR § 745.85(b)(1).

<sup>19</sup> 40 CFR § 745.85(b)(2).

<sup>20</sup> 40 CFR § 745.85(b)(3).

<sup>21</sup> 40 CFR § 745.85(b)(4).

<sup>22</sup> 40 CFR § 745.86.

<sup>23</sup> Pub. L. 102-550.

<sup>24</sup> 63 Fed. Reg. at 29,915.

<sup>25</sup> 63 Fed. Reg. 70,233 (Dec. 18, 1998).

<sup>26</sup> *Id.* at 70,239.

<sup>27</sup> *Id.* at 70,241-70,242.

<sup>28</sup> *Id.* at 70,242.

<sup>29</sup> 63 Fed. Reg. 70,190 (Dec. 18, 1998).

<sup>30</sup> *Id.* at 70,194.

<sup>31</sup> *Id.* at 70,208.

<sup>32</sup> *Id.* at 70,228.

<sup>33</sup> *Id.* at 70,208.

<sup>34</sup> *Id.* at 70,194.

<sup>35</sup> *Id.* at 70,206.

<sup>36</sup> *Id.* at 70,207.

<sup>37</sup> *Id.* at 70,205.

<sup>38</sup> *Id.* at 70,229.

<sup>39</sup> *Id.* at 70,208.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 70,210.

<sup>42</sup> *Id.* at 70,212.

<sup>43</sup> *Id.* at 70,213.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 70,209.

<sup>46</sup> *Id.* at 70,206.

<sup>47</sup> *Id.* at 70,210.

<sup>48</sup> *Id.*