

## Environmental, Telecomm, Utilities & Energy Law

# Lead Paint Hazard Enforcement Trends: Swift Action, Stiffer Penalties


By Maureen D. Smith

The overall reduction in childhood lead poisoning over the last three decades is considered a success story in environmental health, but problems persist as new poisonings are reported each year.

Even though lead paint was banned from residential use in 1978 after being linked to serious neurological and health problems, it is still the most common, highly concentrated source of lead exposure for young children and pregnant women. The issue was recently brought to light in New Hampshire when the US Environmental Protection Agency (EPA) announced a major enforcement action against three Manchester companies that allegedly exposed tenants to lead paint dust and debris during building renovations. EPA's increasing presence in New England to enforce lead paint rules raises both risks and opportunities for regulated businesses and counsel.

The Toxic Substances Control Act (TSCA) has evolved over the past few decades to include provisions designed to address lead paint hazards. Under TSCA authorities, EPA developed a comprehensive regulatory program covering a host of renovation, repair and painting activities in housing built before 1978, called "target housing." The program also covers pre-1978 buildings frequented by young children, including day care centers and pre-schools, called "child-occupied facilities."

The renovation, repair and painting (RRP) rule, along with companion rules on pre-renovation education and lead-based paint activities, certification and training, establish strict training, certification, accreditation, notification, record-keeping requirements and work practice standards for both renovation and lead paint abatement activities. In addition, EPA's lead-based paint real estate notification and disclosure rule requires owners, managers and agents for pre-1978 residential properties to provide prospective renters and purchasers with certain information, including

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- EPA's increasing presence in New England to enforce lead paint rules raises both risks and opportunities for regulated businesses and counsel.
  - Although the program does not cover public and commercial buildings, EPA has considered extending certain aspects of rules to the commercial sector.
  - Civil penalties, which can be assessed on a daily basis, have grown from \$25,000 to \$37,500 per violation as a result of inflation adjustments and 2016 TSCA reforms.
  - The recent TSCA reforms also substantially increased criminal sanctions for "knowing" violations, with potential fines increasing from \$25,000 to \$50,000 per violation.

information on known lead paint risks.

The RRP rule, fully implemented in 2010, covers building conversions and common repairs performed for compensation in target housing and child-occupied facilities. This includes window replacements, painting surface preparation and weatherization where lead paint is disturbed, unless the repairs qualify as minor. Regulated entities can include residential property owners, managers, general contractors and professional trades like plumbers, electricians, carpenters and painters. Although the program does

not cover public and commercial buildings, EPA has considered extending certain aspects of rules to the commercial sector.

TSCA's criminal and civil sanctions for violation of the RRP program rules have increased in severity over time. Civil penalties, which can be assessed on a daily basis, have grown from \$25,000 to \$37,500 per violation as a result of inflation adjustments and 2016 TSCA reforms. The recent TSCA reforms also substantially increased criminal sanctions for "knowing" violations, with potential fines increasing from \$25,000 to \$50,000 per violation. New statutory sanctions were also added for persons who knowingly place individuals in "imminent danger of death or serious bodily injury," where fines of up to \$250,000 (\$1 million for organizations) or imprisonment for up to 15 years can be imposed upon conviction. Under the disclosure rule, non-disclosure of known lead paint hazards in the sale or rental context can also trigger treble damages and award of attorneys' fees to third party claimants.

EPA enforcement has been brisk. In 2001, EPA criminally prosecuted a Manchester, NH landlord who allegedly forged a required disclosure form after the lead poisoning death of a tenant's child. Civil enforcement of the RRP rule has increased over time, with the number of civil cases increasing from 61 to 75 between 2014 and 2015, almost double the number brought in earlier years. Some penalties are sizeable. For example, in 2014, Lowe's Home Centers agreed to pay a \$500,000 civil penalty and to implement a corporate-wide compliance program to ensure that its subcontractors followed lead-safe work practices.

After a 2015 regional initiative and investigation, EPA filed two civil complaints assessing almost \$300,000 in penalties, along with full cleanup, against a Manchester property owner and renovator for allegedly violating the RRP and disclosure rules.

New England's predominantly older housing stock raises the stakes for local businesses that renovate or lease regulated properties. Counsel can play a role in risk management by helping businesses that convert or renovate older buildings to determine whether their clients' activities trigger certification, work practice, disclosure and other regulatory requirements. Taking steps like conducting pre-renovation surveys of hazardous building materials and ensuring that subcontractors meet certification, training and work practice standards can help to ensure compliance.

If violations are discovered, immediately remedying the situation can be important in both enforcement and third-party claim contexts. If civil enforcement action is taken, prospects for resolution through remediation and negotiated penalties can be pursued while preserving the right to a hearing. TSCA's penalty mitigation provisions and EPA enforcement policies, many of which are specifically targeted to small businesses, can assist with development of defense and settlement strategy.

For example, a company's ability to pay civil penalties is often a driving force, especially for the smallest businesses. By proactively engaging on both liability and mitigation issues, defense counsel can enhance fair and consistent enforcement at the same time that EPA seeks to level the playing field and protect public health.

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