



EPA's New Layer of Lead-Based Paint Rules

The US Environmental Protection Administration (EPA) has just issued a new rule on addressing lead-based paint during renovations. Adding to an already complex regulatory regime, this new set of rules governing lead-based paint, phases in implementation between June 23, 2008 and April 22, 2010. Covering the same ground as the repair and renovation portions of New York City's Local Law 1 of 2004 (LL 1), but with different procedures and thresholds for applicability, the new rules create a confusing alternate scheme for treating lead-based paint during renovation and repair of homes, apartments and *child-occupied facilities* built prior to 1978. This edition of *The Inside Edge* will focus on the rule's application to residential housing (leaving aside its impact on *child-occupied facilities*).

Disclaimer: This article is not intended to be, nor should it be taken as, legal advice in regard to any repair or renovation work which involves the treatment or abatement of surfaces containing lead-based paint. Prior to doing any work involving lead-based paint or any other similar lead-based coating, you should consult with a qualified professional to determine which laws, rules and procedures may apply.

Citizens Housing & Planning Council

Founded in 1937, CHPC is a non-profit policy research organization dedicated to improving housing and neighborhood conditions through cooperative efforts of the public and private sectors.

These rules govern the precautions that must be taken by homeowners, owners of rental housing and contractors with regard to the renovation and repair of pre-1978 private housing that has, or is assumed to have, lead-based paint with a lead content in excess of 1.0 milligram per square centimeter. They are the last set of rules mandated by the *Residential Lead-Based Paint Hazard Reduction Act of 1992's* amendments to the *Toxic Substances Control Act (TSCA)*.

Residential property in New York City is also governed by LL 1 as explained in rules issued by the New York City Department of Health and Mental Hygiene and the New York City Department of Housing Preservation and Development. LL 1. According to the EPA, owners and contractors will have to comply with both the EPA rules and LL 1. Generally speaking, within New York City, LL 1 will apply to repairs and renovations in multiple dwellings where a child under 6 is present.

The new federal rule adds three categories of housing that are undergoing repair or renovation that had not previously been subject to lead-based paint regulation in New York City;

- 1) pre-1978 units where there is no child under 6;
- 2) one and two family houses; and
- 3) owner occupied coops and condos.

In many instances LL 1 and the new EPA rules specify different ways of dealing with similar situations. Attempting to figure out which set of rules apply will often be confusing. For example coops and condos that are sublet and have a child under 6 will be governed by LL 1. Those that are sublet without a child under 6 will be governed by the new EPA rule. Those that are owner occupied, with or without a child under 6, will be governed by the new EPA rule. Worse the two sets of rules will interact in ways that will be contradictory.

Overview of New EPA Rules

Unlike prior EPA rules, which governed conduct for the abatement of lead-based paint primarily in federally assisted housing¹, these new rules now specify notification and work practices for renovations and repairs in *all* privately owned housing even where there is no federal assistance. The rules define *target housing* as all pre-1978 housing (except elderly and housing for the disabled and 0 bedroom units).

The new rules require that repair and renovation in such buildings be done by trained *certified renovators*, employed by *EPA certified renovation firms*, using EPA specified renovation work practices. After work is done, trained *dust sampling technicians* must ensure that the work area was properly cleaned. These are new categories of trained lead-based paint personnel, which the new rule defines, and for which it sets up requirements for the accreditation of the workers and their new training programs.

1. Technically the pre-existing EPA rules apply wherever an owner has the "intent" of abating lead-based paint. As a practical matter this almost only occurs where the U.S. Department of Housing and Urban Development (HUD) requires lead-based paint abatement under HUD rules or where LL 1 requires abatement of lead hazards.



When Do These New Rules Apply?

The new rules cover pre-1978 housing and child-occupied facilities where renovation work is done *for compensation* and the renovation work will disturb surfaces with lead-based paint. Thus homeowners, doing work on their own homes, are exempt. If, however a homeowner hires a contractor, the new rules *will* apply unless the homeowner (who occupies the home) certifies to the contractor that there is no child under 6 or pregnant woman present. When landlords use their own workers on *any* rental property, including one and two family houses, they are deemed to be doing work for compensation and thus their properties are included.

Both interior and exterior work are regulated. However a *minor repair* is exempt. A minor repair is defined as disturbing a surface of less than 6 square feet on an interior surface or 20 square feet on an exterior surface. This is different from LL 1 which defines a minor repair on an interior surface as 2 square feet. Window replacement is *not* a minor repair, regardless of the size of the window.

As with the current EPA rules on federally assisted housing, surfaces that are free of lead-based paint are exempt from the rule. However the new rules provide for a new method of determining whether a surface has lead-based paint. EPA now authorizes the use of test kits that involve an on site chemical test for the presence of lead-based paint. While the new rule notes that no such test kits currently exist that fully meet their standards, EPA believes they will be available by April 2010 when that part of the rule goes into effect. EPA has temporarily authorized the use of currently existing test kits such as the Lead Check® test kit². EPA also authorizes a *certified renovator* (see below), using a test kit, to make the determination rather than requiring that a certified risk assessor or lead-based paint inspector make the determination as they do under the pre-existing rules.

Work Procedures

The rule prohibits the use of dust generating techniques in renovation. This includes the use of:

- 1) open flame burning or torching;
- 2) power sanding, grinding, planing, needle gun, abrasive blasting and sandblasting unless such machines have a HEPA exhaust control; and
- 3) using a heat gun over 1100°F.

In another conflict with LL 1, EPA allows dry sanding of surfaces by hand, while LL 1 prohibits any dry sanding and requires that all sanding of lead-based painted surfaces be wet sanding.

2. The temporarily authorized test kits tend to give more false positive results than EPA's standard for the final test kits.

EPA has created a new category of trained personnel called *certified renovators* who must be formally trained and certified and who supervise all lead work. Individual workers need not have received formal training. However, they must get on the job training from a certified renovator and be supervised by certified renovators to insure that they perform work in the required manner. All such workers must be employed by certified renovation firms, who are responsible for insuring that all requirements are met.

The rules set up a new system for accrediting programs to train these new workers. In the meantime existing workers trained and/or certified as risk assessors, lead paint inspectors, lead abatement workers and lead abatement supervisors are "grand fathered" as permissible workers under the new rule.

EPA's new work procedures are otherwise familiar to those who have worked under the existing rules. Work areas must be enclosed in plastic, and may not be entered until final clean-up. Objects within the work area must either be removed or sealed in plastic. Safe work procedures apply in the interior of units as well as the public areas. Modified procedures apply to the exteriors of buildings.

Clean Up and Verification

The clean up process follows procedures set forth in prior rules including the careful removal of plastic coverings, wet mopping, and HEPA (high efficiency particulate air) vacuuming of carpets and fabric covered furniture.

The most dramatic change in these rules is clean up verification. Under pre-existing rules and under LL 1, clean up verification must be performed by a third party tester who performs a dust wipe sample that must be sent to a lab for analysis. Results take a day or two, and if the test does not meet clearance standards, require that the cleaning and testing process be repeated. Since the work area cannot be occupied until it passes clearance, re-occupancy of the work area by the occupants can be delayed. As a result moderate rehabilitation has become difficult and expensive in New York City under LL 1, often forcing relocation of tenants who are usually reluctant to leave their apartments.

Unlike those prior federal rules, and LL 1, the "third party dust wipe with laboratory analysis" has been replaced by the *white glove test* (a/k/a *the Swiffer Wet Jet test*). This new process allows residents to return to the work area quickly after completion, rather than waiting a day or two for a lab analysis of a dust wipe. A certified renovator conducts the cleaning verification. This person need not be a third party, and will typically be the same employee of the certified firm who supervised the work.



An "instant" lead test kit of the kind temporarily approved by the EPA in its new rules.



A Swiffer WetJet® used as part of the new clearance test procedures.

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First the certified renovator must visually confirm that all visible dust and debris has been cleaned up. Second, the certified renovator must conduct the *white glove test*. For window wells the certified renovator must wipe a wet commercial cleaning cloth across the window well. The surface of the cloth is then compared to a standard cleaning verification card. If the cloth is lighter than the cleaning verification card, then the window well has passed clearance. If it is darker than the card, then the window well must be re-cleaned and the white glove test performed again. If it fails again, then the certified renovator waits for the window well to dry and then wipes again using a dry cleaning cloth. At this point the window well has passed clearance. (N.B. -you do not need to compare the cleaning cloth to the verification card again.)

Floors and counter tops are done in a similar manner under the new rule. Floors are divided into 40 square foot sections and each section must separately achieve clearance. Floors must be wiped with a device “with a long handle and a head to which the cloth is attached” (this describes a Swiffer Wet Jet® or one of its competitors). The procedures are otherwise the same as the window well procedure described above.

Notification and Record Keeping

Needless to say, the certified renovation firm must keep records of all the procedures specified above. It also must keep track of the various notifications required by the new rules. The previously existing requirement for private renovation and repair was that the resident of the unit receive the EPA pamphlet *Protect Your Family from Lead in Your Home*. After December 22, 2008 that pamphlet will be discontinued and renovators must provide EPA’s new pamphlet *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools*³.

The certified renovation firm is required to deliver the pamphlet to the occupant of the dwelling unit not more than 60 days prior to commencement of the work. The firm must obtain a written acknowledgement of the delivery of the pamphlet or certify that it was delivered and why no acknowledgment was obtained.

If the work to be done is in a common area of a building, the firm must notify the resident of each affected unit and make the pamphlet available. The firm must also post signs where they are likely to be seen by the occupants of the building describing the nature and locations of the work. The posting must also include the pamphlet or info on where to get the pamphlet.

Timing

While these rules are in effect as of June 23, 2008, different parts go into effect at different times:

June 23, 2008: States may begin applying to EPA to administer and enforce training programs.

April 22, 2009: Individual training programs may apply to the states for accreditation.

October 22, 2009: Renovation firms may begin applying for certification.

April 22, 2010: All renovation work in target housing must be done by certified firms, using trained renovators, following supervision and cleanup requirements.

Which Rules Apply to Me?

While there are many things to applaud in these rules, such as simplified training and faster re-occupancy, they add another set of differing procedures to overlapping and sometimes contradictory state and local provisions on treating lead-based paint. The general theory of these rules is that more restrictive state and local laws will not be overridden by the federal rules.

If you work in New York City, your work will mostly be governed by LL 1 if you are doing work in a child-occupied unit in a multiple dwelling. If you are doing work in a pre-1978 housing unit without a child, in a coop or a condo without a child, or in a one or two family house, the new federal rules will likely govern.

Due to a series of last minute compromises, the rules themselves will require continuing clarification. EPA has formed a working group on the rules which will issue clarifications as issues arise. These clarifications, the rule itself and additional materials can be found at the EPA web site, <http://www.epa.gov/lead/>.

Frequently, however the question as to which rules apply will only be resolved through a case by case analysis. Confusion will reign until state and local jurisdictions bring their laws and rules into conformity with the federal rules. To alleviate this confusion, New York City should repeal the repair and renovation provisions of LL 1 and allow the new EPA rules to govern this issue.

CHPC will be holding a panel discussion on the new rules in the fall. If you wish to attend send your request to info@chpcny.org, or check our web site for updates (www.chpcny.org).

3. Pamphlet available at:
<http://epa.gov/lead/pubs/renovaterightbrochure.pdf>