



**WISCONSIN COUNCIL ON
CHILDREN
and FAMILIES**

RESEARCH • EDUCATION • ADVOCACY

September 11, 2001

Board of Directors

- JUDY CRAIN, *President*
Green Bay
- LARRY HAGAR, *Vice President*
Wausau
- JACQUELYN L. BOGCESS, *Secretary*
Madison
- DEBRA SUCHLA, *Treasurer*
La Crosse
- NANCY ARMBRUST
Green Bay
- DONALD BECKER
Madison
- NANCY BOUTELLE
Beloit
- TONYA BRITO
Madison
- MISSY CAMPION
Milwaukee
- ROSE DOBKOSKI
Green Bay
- LYNNE EDEBOHLS
Madison
- COLLEEN ELLINGSON
Milwaukee
- MARCIA ENGEN
Appleton
- DAVID EWALD
South Milwaukee
- DONNA FREEMAN
Green Bay
- ELOISA GOMEZ
Milwaukee
- CAROL HAND
Lac du Flambeau
- GLORIA JOHNSON-POWELL
Madison
- LISA KELLER
Oconomowoc
- ROBERT KING
Milwaukee
- DON MAURER
Waukesha
- KARL NICHOLS
Milwaukee
- RICHARD PERRY
Beloit
- DENNIS SCHULTZ
Kenosha
- THELMA SIAS
Milwaukee
- BETSY THOMSON
Beloit
- BRENDA WARD
Milwaukee
- MARCUS WHITE
Milwaukee

Administration

- ANNE ARNESEN, *Executive Director*
- NAN BRIEN, *Associate Director*

Rep. Tom Sykora, Chairman
Assembly Housing Committee
Capitol Building
Madison, WI 53708

Sen. Mark Meyer, Chairman
Senate Committee on Universities, Housing
and Govt. Operations
Capitol Building
Madison, WI 53708

Re: HFS 163, relating to certification for the identification, removal and reduction of lead based paint hazards and the issuance and registration of certificates of lead-free status and lead safe-status.

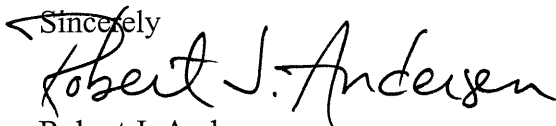
The Wisconsin Council on Children and Families is a nonprofit organization that advocates on behalf of children and families in Wisconsin. We have long been involved in advocating on policies that relate to the early brain development of children and to issues relating to the health and safety of children in Wisconsin.

We are very concerned about the development of these proposed rules, because of the effect that they will have on the children of this state who live in residential rental properties, especially low income children. As has been well documented, the deterioration of lead paint in residential dwelling units can have a seriously detrimental effect on the health and intelligence of small children.

We would like to be included in whatever hearings or discussions that you would like to undertake regarding these proposed rules.

We understand that property owners have legitimate concerns about the requirements of implementing these rules, which must be balanced with the grant of immunity which is offered to them under the proposed rules and the authorizing legislation, 1999 Wisconsin Act 113.

Thank you for your consideration.

Sincerely

Robert J. Andersen
Project Attorney



A MEMBER OF THE NATIONAL ASSOCIATION OF CHILD ADVOCATES

9/19/01

Bob Dennit
WI Rental Housing Legislative Council

250 - 1893

re: Lead paint rules

Concerns include:

- That rules will be too strict & cumbersome
- The rules will be too costly
- Concerns about the training requirements

IF rules too cumbersome - No one will participate

Also feel if rules more strict than
HUD / EPA Wisconsin could lose
Federal money

Huber, Grant

From: Hess, Martha
Sent: Thursday, September 27, 2001 11:06 AM
To: Huber, Grant
Subject: FW: Content of the letter to Leg. Council

-----Original Message-----

From: Hess, Martha
Sent: Friday, September 21, 2001 11:45 AM
To: Hess, Martha; 'rddenick@aol.com'
Subject: RE: Content of the letter to Leg. Council

-----Original Message-----

From: Hess, Martha
Sent: Thursday, September 20, 2001 2:04 PM
To: 'rddenick@aol.com'
Subject: Content of the letter to Leg. Council

September 19, 2001

Director Terry C. Anderson
Wisconsin Legislative Council Staff
1 E. Main Street, Ste. 401
Madison, WI 53703

Re: Wis. Stats. Chapter 254, 99 Wis. Act 113 and DHFS' Proposed Re-creation of Wis. Chapter 163

Director Anderson:

I am writing to express my concern that several sections of DHFS' proposed re-creation of Chapter HFS 163 are inconsistent with the intent of the Legislature as expressed in Wis. Stats. Chapter 254 and particularly with those provisions included within 99 Wis. Act 113. As the lead Assembly author of Act 113 and chairman of the Assembly Housing Committee, I would like to request an informal opinion to clarify whether the Department's rule proposal exceeds its authority under Chapter 254.

My intent with Act 113 was to limit the grant of rulemaking authority to meet but not exceed (and always remain consistent with) federal regulatory scheme already in place. I believe this is also consistent with pre-existing sections of Chapter 254. Among the several provisions of Chapter 254 which reflect this intent is Sec. 254.172(1), Stats., which states:

254.172 Lead hazard reduction.

"Subject to the limitations under 254.174 (consultation with LTAC), the department may promulgate rules governing lead hazard reduction that the department determines are consistent with federal law. Any rules promulgated under this section shall meet, but not exceed, any requirements under regulations promulgated by the administrator of the federal environmental protection agency under section 402 of the federal toxic substances control act, as created by section 1021 of P.L. 102-550."

The statutory mandate to DHFS to establish the lead-safe/free certification system and the property registry not only continues the requirement to promulgate consistent rules but requires biennial review to ensure consistency with federal law.

254.179 Rules for dwellings and premises.

(1) Subject to s. 254.174 (consultation with LTAC), and after review of ordinances of cities, towns and villages in this state, the department shall, by use of a research-based methodology, promulgate as rules all of the following:

(2) By January 1, 2003, and every 2 years thereafter, the department shall review the rules

under sub. (1) and shall promulgate changes to the rules if necessary in order to maintain consistency with federal law.

Pre-existing law not only recognized the need for consistency with federal law, it mandates the Department to promulgate rules superseding Wisconsin statutes when statutory definitions were no longer consistent with federal standards.

254.156 Definition of lead-bearing paint and lead poisoning or lead exposure.

Notwithstanding s. 254.11 (intro.), (8) and (9), whenever the centers for disease control and prevention of the federal department of health and human services specifies a standard for the determination of lead-bearing paint or lead poisoning or lead exposure that differs from that specified in s. 254.11 (8) or (9), the department shall promulgate a rule defining "lead-bearing paint" or "lead poisoning or lead exposure" to correspond to the specification of the centers for disease control and prevention. Rules promulgated under this section supersede s. 254.11 (8) and (9) with respect to the requirements of this subchapter.

My greatest concern is with the Department's creation of certification requirements for persons disturbing lead-based paint in registry properties. Federal and state law both require certification for abatement but not (with limited exceptions) for interim controls or work done on one's own home (no tenants). This scheme is found in Wisconsin law at Wis. Stat. s. 254.176, which reads in part:

254.176 Certification requirements.

(1) Except as provided in sub. (2) and s. 250.041, and subject to s. 254.115, the department may establish by rule certification requirements for any person who performs lead hazard reduction or a lead management activity or who supervises the performance of any lead hazard reduction or lead management activity.

(2) No certification is required under this section for lead hazard reduction conducted by any of the following persons, unless the lead hazard reduction is being done to comply with an order by the department or another state or local agency that requires the use of persons certified under this section:

(a) A person whose activities are limited to interim control activities, unless the activities are directly funded by a grant from the federal department of housing and urban development.

(c) A homeowner who engages in lead hazard reduction only in or on his or her own nonrental residential dwelling or real property.

(3) Except as provided in s. 250.041 and subject to s. 254.115, the department may promulgate rules establishing certification requirements for persons required to be certified under this section. Any rules promulgated under this section:

My understanding of the Department's rules is that certification will be required for lead paint activities which are interim controls. Furthermore, I understand that home owners (no tenants) will be required to be certified if they perform lead hazard reduction activities in his or her non-rental property once it is in the registry. Finally, I believe that the proposed rules would require certification of tenants and other persons performing certain interim control activities in registry properties. The Department argues that the provisions of Wis. Stat. s. 254.179(1)(c)2. not only authorize the certification of persons performing interim controls but that this provision which is addressing properties obtaining lead-safe certification supercedes the specific limitations set forth in s. 254.176.

254.179 Rules for dwellings and premises.

(1) Subject to s. 254.174 and after review of ordinances of cities, towns and villages in this state, the department shall, by use of a research-based methodology, promulgate as rules all of the following:

(c) The period of validity of a certificate of lead-free status or a certificate of lead-safe status, including all of the following:

2. The standards limiting the length of validity of a certificate of lead-safe status, including the condition of a premises, dwelling or unit of a dwelling, the type of lead hazard reduction activity that was performed, if any, and any other requirements that must be met to maintain certification, unless the certificate is earlier revoked because of erroneous issuance or because the premises, dwelling or unit of the dwelling is not safe from lead-bearing paint

hazards. The rules shall specify that the face of the certificate shall indicate the certificate's length of validity. The rules shall further specify that applications for certificates of lead-safe status for identical premises may be made only as follows:

My first question is whether you agree that the Department's proposed rule establishes lead hazard reduction provisions that exceed "any requirements under regulations promulgated by the administrator of the federal environmental protection agency under section 402 of the federal toxic substances control act", particularly as the proposed rules relate to registry properties? In numerous cases the Department has asserted that these rules must be "more protective" than federal law because of the immunity afforded registry property owners. More specifically, do the Department's proposed rules exceed its authority under Wis. Stats. Chapter 254 when it requires persons performing interim controls which fall within the definition of lead-based paint activities to be certified (as well as owner occupants of non-rental properties). Finally, am I correct in interpreting these rules when I state that a tenant performing lead-based paint activities with permission of the owner will be subject to the same certification requirements as the registry property owner?

I look forward to your answers. Should you have questions please don't hesitate to contact me or my office.

Best regards,

Representative Tom Sykora
Chairman, Assembly Housing Committee



Mark Meyer

State Senator • 32nd Senate District

October 4, 2001

Phyllis Dube`, Secretary
WI Dept. of Health & Family Services
1 W. Wilson St, Rm. 650
Madison, WI 53708

Dear Secretary Dube`:

Pursuant to s. 227.19(4)(b), Stats., the Senate Universities, Housing and Government Committee requests that the department not promulgate CHR 00-172, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status.

If you have any questions please feel free to contact my office at **266-5490**.

Sincerely,

Mark Meyer

Mark Meyer
State Senator
32nd District

MM/gh



Major Changes Proposed to Legislative Submission of Chapter HFS 163, Wis. Adm. Code

- Divides activities into abatement and non-abatement lead-based paint activities, instead of the previous proposal to divide activities into low-risk lead-based paint activities and high-risk lead-based paint activities. Thus, depending on the reason the activity is being conducted, different levels of training and certification are required to perform the same activity, rather than different levels of training and certification based on the risk of creating a lead-based paint hazard.
- Returns certification disciplines for lead hazard reduction back to the national standard: lead abatement worker (16 training hours) and lead abatement supervisor (32 training hours), instead of the previous proposal of low-risk worker (8 training hours), high-risk worker (16 training hours), low-risk supervisor (24 training hours) and contractor supervisor (32 training hours).
- Reduces certification options for performing non-abatement lead based paint activities: lead-safe worker (8 training hours), instead of lead-safe maintenance worker (8 training hours) and lead-safe property manager (16 training hours).
- Revises the two days of training for lead abatement worker certification from a 1-day low-risk work course and 1-day high-risk work course to 1-day lead-safe work course and 1-day abatement work course. All topics that apply to both abatement and non-abatement are in the first day of training and all topics specific to abatement are in the second day of training. The first day of training also serves as the basis for lead-safe worker certification. To ensure that lead-safe workers are adequately trained to perform a wide range of activities that disturb lead-based paint, the Department anticipates developing a 1-day lead-safe work course for training providers to use.
- Establishes specific work practice standards for each of the restricted activities, instead of grouping these activities and applying one set of higher standards.

**Wisconsin Department of Health and Family Services
Lead Hazard Reduction Certification Disciplines, Fees and Expiration Dates**

Discipline	Education & Experience Required Before Initial Training	Initial Training	Allowed Activities	Fee	Initial Expiration	Renewal Expiration	Refresher Training
Lead-safe worker*	None	8-hour lead-safe work; OR 8-hour low-risk work; OR 16-hour lead worker.	Perform on-site non-abatement lead-based paint activities on registered lead-safe property, such as maintenance, renovation and remodeling. No abatement allowed. No supervision required. Additional training required to use power tools.	\$50 one-time fee	None	None	None
Lead abatement worker	None	Lead-safe worker training & either 8-hour high-risk work or 8-hour lead abatement work; OR 16-hour lead worker.	Perform on-site lead abatement and non-abatement lead-based paint activities. Supervision is always required for lead abatement activities.	\$75 for 2 years	August 1, in odd year if issued odd year, or even year if issued even year	August 1 every 2 years (2001 renewals expire August 1, 2003)	4 hours, before next renewal
Lead abatement supervisor**	1 year experience as a certified lead worker or supervisor; OR 2 years experience in a related field, such as lead, asbestos or environmental remediation work or in building trades, such as building construction, painting, home remodeling and building maintenance.	Lead abatement worker training & either 16-hour lead abatement supervision or 16-hour lead abatement supervisor; OR 32-hour lead abatement supervisor.	Supervise and perform lead abatement and non-abatement lead-based paint activities, develop occupant protection plans, write lead hazard reduction reports.	\$125 for 1 year \$225 for 2 years	Maximum of 1 year after most recent training Not available on initial certification	1 year after current expiration date 2 years after current expiration date	8 hours, every 2 years 8 hours, before next renewal
Lead project designer**	Bachelor's degree in engineering, architecture or profession related to building construction and design & 1 year experience in building construction & design or related field; OR 4 years experience in building construction & design or a related field.	Lead abatement supervisor training AND 8-hour project design.	Design lead hazard reduction projects, develop occupant protection plans, write lead hazard reduction reports.	\$125 for 1 year \$225 for 2 years	Maximum of 1 year after most recent training Not available on initial certification	1 year after current expiration date 2 years after current expiration date	8 hours, every 2 years 8 hours, before next renewal

* Lead-safe worker certification will be available when proposed rule revisions take effect, which is expected to happen in 2002.

** Must pass a lead supervisor certification examination administered by the Department of Health and Family Services, which is in addition to course tests.

A "lead abatement activity" is any of the following measures when intended to permanently reduce a lead-based paint hazard: removal of lead-based paint, removal, enclosure or encapsulation of a lead-based painted component, and all setup, cleanup, and disposal of debris associated with an abatement activity.

A "non-abatement lead-based paint activity" is any activity which disturbs lead-based paint.

Certified individuals must also be associated with a certified lead company before performing lead abatement activities. For lead-safe work, optional lead-safe company certification will also be available. Certified lead companies and lead-safe companies will receive informational mailings from the DHFS and also may choose to be listed in directories of companies offering lead abatement or non-abatement lead-based paint activities.

**Wisconsin Department of Health and Family Services
Lead Investigation Certification Disciplines, Fees and Expiration Dates**

Discipline	Education & Experience Required Before Initial Training	Initial Training	Allowed Activities	Fee	Initial Expiration	Renewal Expiration	Refresher Training
Lead sampling technician	None	8-hour lead sampling; OR 24-hour lead inspector; OR 40-hour lead risk assessor.	Sampling and clearance following non-abatement activities in a dwelling with fewer than 5 units or in single units of a multifamily dwelling.	\$50 for 2 years	August 1, in odd year if issued odd year, or even year if issued even year	August 1 every 2 years (2001 renewals expire August 1, 2003)	2 hours, before next renewal
Lead inspector *	None	8-hour lead sampling & 16 hour lead inspection; OR 24-hour lead inspector; OR 40-hour lead risk assessor; & XRF manufacturer's training. **	Sampling, clearance, lead inspection, and lead-free inspection.	\$150 for 1 year \$275 for 2 years	Maximum of 1 year after most recent training Not available on initial certification	1 year after current expiration date 2 years after current expiration date	8 hours, every 2 years 8 hours, before next renewal
Lead hazard investigator *	Bachelors degree & 1 year experience; OR associate degree & 2 years experience; OR high school diploma or equivalent & 3 years experience; OR professional certification as an industrial hygienist, professional engineer or registered architect or related profession;	8-hour lead sampling & 16-hour hazard investigation; OR 24-hour lead inspector & 16-hour lead risk assessor; OR 40-hour lead risk assessor.	Sampling, clearance, lead hazard screen, risk assessment, EBL investigation, and lead-safe investigation, but <i>not</i> lead inspection or XRF use.	\$150 for 1 year \$275 for 2 years	Maximum of 1 year after most recent training Not available on initial certification	1 year after current expiration date 2 years after current expiration date	8 hours, every 2 years 8 hours, before next renewal
Lead risk assessor *	OR registered nurse or registered sanitarian employed by a health department.	8-hour lead sampling, 16-hour lead inspection, & 16-hour hazard investigation; OR 24-hour lead inspector & 16-hour lead risk assessor; OR 40-hour lead risk assessor; & XRF manufacturer's training. **	All investigation activities.	\$175 for 1 year \$325 for 2 years	Maximum of 1 year after most recent training Not available on initial certification	1 year after current expiration date 2 years after current expiration date	8 hours, every 2 years 8 hours, before next renewal

* Must pass a certification examination administered by the Department of Health and Family Services, which is in addition to course tests.

** Manufacturer's XRF training will be required when proposed rule revisions take effect, which is expected to happen in 2002.

Experience must be in fields related to lead investigation. Related fields include lead, asbestos or environmental remediation work, or building trades, such as home inspections or construction.

Certified individuals must also be associated with a certified lead company before performing lead abatement activities. For lead-safe work, optional lead-safe company certification will also be available. Certified lead companies and lead-safe companies will receive informational mailings from the DHFS and also may choose to be listed in directories of companies offering lead abatement or non-abatement lead-based paint activities.

"Clearance" means the visual examination & sampling conducted after an activity that disturbed lead-based paint to make a final determination that dust-lead levels are below the clearance level.
 "Elevated blood lead (EBL) investigation" means the environmental investigation activities conducted to identify lead hazards in response to a report of a lead poisoning.
 "Lead inspection" means the on-site, surface-by-surface investigation of painted, varnished or other coated surfaces to determine the presence of lead. A lead inspection identifies whether lead-based paint is present in the tested locations, but does not identify where it is a hazard.

"Risk assessment" means an on-site investigation of paint, dust, water or other environmental media to determine the existence, nature, severity and location of lead hazards. A lead risk assessment does not provide a surface by surface description of where lead-based paint is present. Rather, it looks for lead-based paint hazards and provides recommendations for removing or reducing the hazards.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING AND RECREATING RULES

To repeal and recreate chapter HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status.

Analysis Prepared by the Department of Health and Family Services

Chapter 254, Stats., provides for a comprehensive lead (Pb) hazard reduction program, including lead exposure screening, medical case management and reporting requirements, and the development of lead training accreditation and certification programs. Under the authority of Chapter 254, Stats., the Department promulgated Chapter HFS 163, Wis. Adm. Code, in 1993 to provide a rule for the certification of individuals performing lead hazard reduction and for the accreditation of the courses that prepare individuals for certification. This rule has been revised over time to meet new requirements of the U.S. Environmental Protection Agency (EPA).

Wisconsin met federal standards for a state-administered lead training accreditation and certification program and received EPA authorization effective January 27, 1999. The Department's Asbestos and Lead Section of the Bureau of Occupational Health administers and enforces lead-based paint training, certification and work practice provisions of Chapter HFS 163, Wis. Adm. Code. The Section derives its revenues from two sources: various fees the Department assesses under this chapter and lead program development grant monies the Department receives from EPA.

Under Chapter HFS 163, Wis. Adm. Code, a person offering, providing or supervising lead investigation activities or lead-based paint activities for which certification is required must be certified as a lead company and may only employ or contract with appropriately certified individuals to perform these activities. Effective December 1, 2000, the Department revised the training accreditation and certification requirements of the rule by emergency order. An individual may apply for certification in the following disciplines: lead low-risk worker, low-risk supervisor, high-risk worker, contractor supervisor, sampling technician, inspector, hazard investigator, risk assessor and project designer. The disciplines have been revised again to provide for the following certification disciplines: lead-safe worker, lead abatement worker, abatement supervisor, sampling technician, inspector, hazard investigator, risk assessor and project designer.

For initial certification, the individual must be 18 years of age or older, must meet applicable education and experience qualifications, must successfully complete certification training requirements. To be certified as a lead hazard investigator, inspector, risk assessor, ~~low-risk supervisor or contractor~~ abatement supervisor, the individual must also pass a certification examination. In addition, the Department must accredit the lead training courses that prepare persons for certification.

New Wisconsin Law

On May 22, 2000, the Governor signed 1999 Wisconsin Act 113 into law. Act 113 requires the Department to review local ordinances and promulgate a rule to implement Act 113 using a research-based methodology. Further, the Act directed the Department to consult with an advisory committee on the proposed rule. This rule must establish all of the following:

- Standards that a premises, dwelling or unit of a dwelling must meet for issuance of a certificate of lead-free status or lead-safe status.
- A process for issuing the certificates and registering the properties for which certificates are issued.
- Procedures for revoking a certificate, and the period of validity for a certificate.
- The interim lead hazard control measures a new owner must take in vacant units when immunity from liability is provided during the first 60 days after acquiring a new dwelling.
- The requirements for a training course of up to 16 hours that property owners, their agents and employees may complete to become certified.
- The scope of the lead investigation and lead hazard reduction activities that a property owner, or the property owner's agent or employee may perform following training and certification, to the extent consistent with federal law.

If a dwelling unit has a valid certificate of lead-free or lead-safe status when a person who resides in or visits the unit is lead poisoned, the property owner, and his or her agents and employees are conditionally immune from civil and criminal liability for their acts or omissions related to the lead poisoning or lead exposure.

New Provisions

This order proposes adding the following provisions to Chapter HFS 163:

Subchapter I – General Provisions

- Authority and purpose for activities involving registered lead-free or registered lead-safe property.
- The scope of Subchapter V, which the department proposes adding to implement Act 113.
- Definitions required by new provisions of the rule.

Subchapter II – Certification

- For certification as a lead inspector or risk assessor, a requirement that the applicant submit proof of manufacturer's training for the XRF the person will use in inspections.
- Requirement that photo identification be presented for certification if training was not obtained from a Department-accredited training provider.
- Additional responsibilities for lead companies, including disclosure of information about the work to be performed and more information on the quarterly lead investigation activities summary.
- Information about the protocol for conducting elevated blood lead investigations was added to the work practice standards.

Subchapter III – Accreditation

- Requirement to take photographs of students to submit to the Department and insert in training certificates.

Subchapter V - Registry of Property with Certificates of Lead-Free Status or Lead-Safe Status.

- Standards for registered lead-free property and registered lead-safe property.

- Work practice standards and protocols for lead-free inspections and lead-safe investigations, used to determine whether a property meets the standards to be issued a certificate of lead-free or lead-safe status.
- Limitations on who may conduct lead-free inspections and lead-safe investigations.
- The conditions that must be met to maintain a valid lead-safe certificate.
- Procedures for issuing a lead-free or lead-safe certificate, including the establishment of the effective date and expiration date.
- Procedures for a property owner to obtain a mandatory certificate of lead-free or lead-safe status if a child residing in the property has been identified with an elevated blood level.
- What a property owner must do to have temporary immunity for 60 days after acquiring a dwelling or unit. (Not effective before September 1, 2001.)
- Training and certification requirements for persons who disturb lead-based paint on ~~their own~~ registered lead-safe property.
- Optional certification for businesses who have certified staff and comply with lead-safe work practices.
- Work practice standards and protocols for non-abatement lead-based paint activities ~~that do not involve lead abatement.~~

Consultation with the Lead Technical Advisory Committee and the Public

As mandated by s. 254.174, Wis. Statutes, the Department created a Lead Technical Advisory Committee (LTAC) to make recommendations to the Department concerning promulgation of lead-based paint rules. Advisory Committee members were selected to represent key interest groups. These groups included lead hazard reduction professionals, lead identification professionals, landlords and other property owners, public health departments, child advocates and day care providers.

The Department charged the LTAC with advising the Department on implementation of statutory changes enacted in 1999 Wisconsin Act 113. ~~The LTAC met on May 26, July 12, August 16, September 8 and September 22 to review reports and recommendations from 14 public forums previously held. The LTAC met again on April 6, 2001, to review revisions to the rule that the Department proposed to make in response to public comments.~~ At the May 26, 2000, meeting, members agreed on the following guiding principles for the rules developed to implement Act 113:

- Focus on protecting the most children possible with current resources.
- Encourage proper maintenance as a means of reducing lead poisoning.
- Encourage wide participation in the registry program.
- Reduce confusion by limiting differences between Department rules and other applicable regulations, such as HUD's lead hazard reduction regulations under 24 CFR Part 35.
- Strive for simplicity and clarity in order to achieve better compliance.
- Be sensitive to costs and the impact costs have on the ability to get work done.
- Reward long-term improvements.
- Encourage work when a building is vacant in order to reduce risks to occupants.
- Enforce the regulations in order to encourage compliance.
- Evaluate the registry process regularly and revise as needed.
- Look for resources to reduce lead-based paint hazards.

The LTAC met on July 12, August 16, September 8 and September 22, 2000, to review reports and recommendations from 14 public forums previously held.

The Department's 14 public forums were held in various locations statewide and facilitated relatively wide public participation in the LTAC's development of recommendations. In addition to Department staff and LTAC members, more than 50 people participated in the public forum process. Public forums discussed the following issues:

- Issuance of certificates of lead-free status or lead-safe status.
- Standards buildings must meet to qualify for a certificate.
- Standards for limiting the length of certificate validity.
- Requirements that certificate-holders must meet to maintain a certificate.
- Protocols that a certified lead professional must use when determining whether a building meets the standards for a certificate of lead-free status or lead-safe status.
- Forms for the certificates of "lead-free status" and "lead-safe status."
- Lead-safe work practices that must be used when conducting an activity that disturbs lead-based paint on a property.
- Training and certification of persons who perform work involving property included in the registry of certificates of lead-free status or lead-safe status.
- Educating the public about the registration of property with a valid certificate of lead-free status or lead-safe status.

The LTAC met again on April 6, 2001, to review revisions to the rule that the Department proposed to make in response to public comments.

Comparison to City of Milwaukee's Lead Ordinance

Act 113 directs the Department to include a summary of the differences between the standards under this rule and the standards under a lead ordinance for the City of Milwaukee. As the Department's proposed rule also provides, the Milwaukee lead ordinance authorizes the issuance of a certificate whenever lead-based paint hazards have been controlled. The principal differences between the Milwaukee lead ordinance and what the Department is proposing through this rule involve processes and procedures, not quantitative standards. Under the Milwaukee lead ordinance, Milwaukee Health Department inspectors conduct risk assessments, specify both the work that must be done and the work practices for completing the work, monitor and approve the work, and then verify that a property meets the ordinance requirements based on the unique qualifications of that property. Under the Department's proposed rule, no prior risk assessment is required and the Department does not have the opportunity to monitor the lead hazard reduction activity unless the required notice is submitted to the Department. Private lead professionals (instead of publicly employed inspectors) conduct the lead investigation to verify that a property meets the registered lead-safe property standards, but these lead professionals will arrive after lead hazard reduction, if any, is completed. Since the quality of the preparation is key to the longevity of most lead hazard reduction, the private lead professionals will not be able to determine if a specific lead hazard reduction should last five years or only 1 year. The Department's standards, therefore, have to treat all work the same.

The Milwaukee ordinance specifies actions that must be taken to reduce lead-based paint hazards, while the Department's rule primarily dictates the desired outcome based on EPA's definition of a lead hazard as proposed in 1998. Rather than mandate specific lead hazard reduction methods, the Department uses the flexibility allowed by EPA to encourage the use of innovative, less costly, and more efficient methods of reducing lead-based paint hazards. To encourage property owners to perform those lead hazard reduction activities that last the longest, the Department proposes variable certificate expiration dates that reward activities such as window

replacement. Ideally, no property would have deteriorated lead-based paint or lead-based paint on friction or impact surfaces.

The Milwaukee ordinance, however, might appear to be in conflict with window standards proposed in this rule. The Milwaukee ordinance requires that all *deteriorated components* of a double hung window, except for exterior casings and the exterior sill, have paint removed to bare wood, or be enclosed or replaced. The ordinance does not state a lead hazard reduction requirement if a window has been maintained in good condition. The Department's rule allows lead-based paint to remain on a window if all of the following apply:

- The paint is not deteriorated;
- The substrate is sound;
- Dust-lead hazards are not present;
- The window trough is smooth and cleanable;
- Accumulated paint is not present in areas where it might be crushed to create dust-lead or debris;
- The window functions properly, glazing does not have gaps, and operable storm windows are present and installed unless windows are double-paned or the windows were not designed to have storm windows.

If lead-based paint is not present on a window, however, the property might qualify for a longer certificate.

Finally, the Milwaukee ordinance authorizes the Milwaukee Health Department to provide lead-safe maintenance training, but does not require property owners to be trained. The Department's proposed rule requires persons to be certified in order to perform work that disturbs lead-based paint on registered lead-safe property, and provides several levels of certification. HUD requires lead-safe maintenance or renovation training for work in Section 8 housing.

New Federal Regulations

The U.S. Department of Housing and Urban Development (HUD) revised 24 CFR Part 35 effective September 15, 2000. The regulations require most properties owned by the federal government or receiving federal assistance to conduct specified activities to reduce lead hazards. The HUD regulations most directly affect property owners receiving federal rehabilitation funds and landlords whose tenants receive federal rental assistance.

To comply with HUD's requirements, most properties receiving federal funds for renovation or rehabilitation must have a risk assessment completed and certified persons must be used to reduce or eliminate the lead-based paint hazards identified in the risk assessment report. Property owners receiving funds for rental assistance or renovation must also use trained people to perform maintenance or renovation activities and must have a clearance visual inspection and dust-lead sampling conducted after completing activities that disturb lead-based paint. In some cases, the regulations also require annual re-evaluation of the property by a certified lead risk assessor.

The Department has worked with HUD to enable the Department to accredit HUD-approved lead-safe maintenance and lead-safe renovation courses with only slight modification from the basic HUD requirements. ~~The~~ On June 18, 2001, the Department ~~has also submitted a request to HUD for~~ received approval ~~off~~ from HUD for Department-accredited lead low-risk work courses as allowable training for performing lead-safe maintenance and renovation under HUD regulations; approval is anticipated.

On June 3, 1998, EPA proposed standards for identifying lead-based paint hazards under the authority of SECTION 403 of the federal Toxic Substance Control Act. Final regulations implementing Section 403 took effect on March 6, 2001. Unlike previous federal lead-based paint legislation that focused only on the presence of lead-based paint, this legislation switches the focus of Federal lead-poisoning prevention efforts away from the removal of lead-based paint and toward management of lead-based paint hazards.

The EPA standards will play an important role in the national lead-based paint program. For example, the standards will be used by risk assessors to determine if lead-based paint hazards exist in pre-1978 housing and child-occupied facilities (e.g., daycare centers). Property owners will use the standards to identify conditions that must be disclosed before leasing or selling target housing under regulations of HUD and EPA. In addition, these regulations will provide advice to the public about conditions that present health risks to young children ~~that should be addressed~~. EPA-authorized lead training and certification programs, including the program administered by the Department, must incorporate the standards into State rules as a minimum standard no later than February 5, 2003. The standards may also be incorporated into local laws and regulations, housing codes, and lending and insurance underwriting standards.

EPA is also preparing to promulgate lead training and certification requirements under 40 CFR Part 745 for persons performing renovation and remodeling regulations. Under these regulations, any person who disturbs paint in a pre-1978 dwelling, other than a homeowner performing activities in an owner-occupied dwelling, will have to complete lead-safe training. EPA is also considering requiring a visual inspection and dust sampling for clearance after any activity that disturbs paint in a pre-1978 dwelling, except when work on owner-occupied property was done by the property owner.

The Department's authority to repeal and recreate these rules is found in ss. 227.24 (1), 250.04 (7), 250.041, 254.115, 254.15, 254.167, 254.172, 254.176 (1) and (3), 254.178 (2), and 254.179, Stats. The rules interpret ss. 254.167, 254.171, 254.172, 254.173, 254.176, 254.178, 254.179, 254.18 and 284.181, Stats.

SECTION 1. Chapter HFS 163 is repealed and recreated to read:

Chapter HFS 163

CERTIFICATION FOR THE IDENTIFICATION, REMOVAL AND REDUCTION OF LEAD-BASED PAINT HAZARDS

Subchapter I – General Provisions

- HFS 163.01 Authority and purpose.
- HFS 163.02 Scope.
- HFS 163.03 Definitions.

Subchapter II – Certification of Persons to Perform Lead Hazard Reduction Activities or Lead Investigation Activities

- HFS 163.10 Certification of an individual.

- HFS 163.11 Certification training requirements.
- HFS 163.12 Certification of a lead company.
- HFS 163.13 Responsibilities of certified persons.
- HFS 163.14 Work practice standards.
- HFS 163.15 Lead-based paint hazard standards.

Subchapter III – Accreditation of Lead Training Courses and Approval of Training Managers and Instructors

- HFS 163.20 Accreditation requirements.
- HFS 163.21 Application for accreditation.
- HFS 163.22 Accreditation procedures.
- HFS 163.23 Renewal of course accreditation.
- HFS 163.24 Training manager and instructor approval.
- HFS 163.25 Administrative responsibilities of training managers.

Subchapter IV – Enforcement

- HFS 163.30 General provisions.
- HFS 163.31 Reasons for enforcement actions.
- HFS 163.32 Enforcement actions.
- HFS 163.33 Appeal.

Subchapter V – Registry of Property with Certificates of Lead-Free Status or Lead-Safe Status

- HFS 163.40 General provisions.
- HFS 163.41 Certificate of lead-free status.
- HFS 163.42 Certificate of lead-safe status.
- HFS 163.43 Certification of property owners and employees to perform non-abatement lead-based paint activities on registered lead-safe property
- HFS 163.44 Work practice standards for non-abatement lead-based paint activities on registered lead-safe property.

Appendices

Subchapter I - General Provisions

HFS 163.01 Authority and purpose. (1) GENERAL. This chapter is promulgated under the authority of ss. 250.04 (7), 250.041, 254.115, 254.15, 254.167, 254.172, 254.176 (1) and (3), 254.178 (2) and 254.179, Stats.

(2) ACTIVITIES INVOLVING TARGET HOUSING AND CHILD-OCCUPIED FACILITIES. This chapter is intended to ensure that persons who perform lead hazard reduction activities or lead investigation activities do so safely to prevent exposure of building occupants to hazardous levels of lead. This is accomplished by requiring an individual to be trained and certified under s. HFS 163.10 before the individual performs, supervises or offers to perform or supervise specified lead hazard reduction or lead investigation activities involving target housing or a child-occupied facility or the real property on which the target housing or child-occupied facility stands. In addition, the certified individual is required to be associated with a lead company certified by the department under s. HFS 163.12. Subchapter II of this chapter also requires that a training course that is represented as qualifying any person for certification to perform lead abatement or lead



State of Wisconsin
Department of Health and Family Services

OCT 29 RECD

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

October 29, 2001

The Honorable Mark Meyer, Chairperson
Senate universities, Housing and Government Committee
Room 131 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Meyer:

Clearinghouse Rule 00-172 is currently within the final 10 days of the Assembly Committee on Housing's review period. Under s. 227.19 (4) (b) 3., Stats., if an agency, on its own initiative, submits a germane modification to a proposed rule to a committee within the final 10 days of a committee review period, the review period of the assigned committees in both houses is extended for 10 working days. The Department has modified subdivision HFS 163.41 (2) (a) 4., a section of proposed chapter HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits this germane modification, contained on the following page, for your committee's consideration.

It is our understanding that this submission extends your committee's review until November ~~12~~, 16, 2001.

Sincerely,

A handwritten signature in black ink, appearing to read 'Phyllis J. Dubé', written over a printed name.

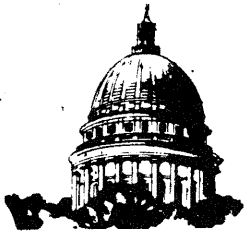
for
Phyllis J. Dubé
Secretary

attachment

HFS 163.41 (2) (a) 4. 'Clearance.' A lead-free inspection shall include clearance under s. HFS 163.14 (1) of the work area where more than 2 square feet of paint was removed or more than 2 square feet of paint was disturbed in removing a painted component ~~was removed~~, if known, or of the dwelling units and common areas inspected under subd. 2., unless one of the following is obtained:

a. ~~A~~ When the paint has not been proven to be lead-free, a clearance report issued by an appropriately certified person after the most recent removal of more than 2 square feet of paint or removal of a painted component when the removal disturbed more than 2 square feet of paint ~~unless the paint is proven to be lead-free~~. A certified individual involved with conducting clearance that is included in a lead-free inspection may not be a property owner or an immediate family member, agent or employee of a property owner or associated with a certified lead company that is directly or beneficially owned, controlled or managed by a property owner, or by an immediate family member, agent or employee of a property owner.

b. The following statement signed by the property owner or the property owner's agent or employee and dated at the time of signature: "During the previous 12 months, no person removed a total of more than 2 square feet of paint or disturbed more than 2 square feet of paint when removing a painted component from the real property included in this lead-free inspection. ~~This statement is made based on my own personal knowledge and statements made to me by the property owner and any agent of the property owner.~~"



State Senator
Kevin Shibilski

October 30, 2001

State Senator Mark Meyer, Chair
Senate Committee on Universities, Housing and Government Operation
131 South, State Capitol
Madison, WI 53707

Dear Chairman Meyer:

As a follow up to ongoing communications my office has had with your office regarding the proposed Lead Paint Rules (Clearinghouse Rule 00-172), I am requesting that you reject, wholesale, the proposed lead paint rules before your committee and call for a complete rewrite.

As currently written, the proposed rules would be nearly impossible to comply with for thousands of Wisconsin's small businessmen and women and many homeowners. In contrast to the simple and effective federal requirements already in place, the current proposed rules are overly complex and redundant. Real estate owners and apartment owners in my district have made it clear that HUD, EPA, and OSHA lead paint rules provide the necessary requirements and protections and should serve as the guide for Wisconsin rules.

The proposed rules relating to immunity from liability are convoluted to the point that few, if any, property owners in the state would or could comply. As an example, the proposed rules do not allow for lead-safe training until the age of 18. Painting is one of the most popular means of employment for those 16 to 18 years old. It is clear from this example and many others that the proposed rules do not pass the "real world" test and are written in a manner that would not allow for their successful and effective implementation.

Again, I ask that you reject the proposed rules and start from the beginning with the goal of creating logical, efficient and effective rules that are better suited for actual implementation and for the protection of the public from the hazards of lead contamination.

Thank you for your consideration of this request. Please feel free to contact my office with questions or comments.

MORE

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Shibilski', with a long horizontal flourish extending to the right.

KEVIN SHIBILSKI
State Senator
24th Senate District

cc: Members of the Senate Committee on Universities, Housing and Government Operation
Members of the Joint Committee for the Review of Administrative Rules
Phyllis Dube, Secretary, Department of Health and Family Services

Huber, Grant

From: Staff, Rick -VP Legal Services [rikstaff@wra.org]
Sent: Wednesday, November 07, 2001 9:46 AM
To: John Kiesow (E-mail); 'Martha.Hess@legis.state.wi.us'; 'Bob Dennik (E-mail)'; 'kelly@martinscheiber.com'; 'tabrentals@aol.com'; 'Rep.Coggs@legis.state.wi.us'; 'Sen.Jauch@legis.state.wi.us'; 'adam.korbitz@legis.state.wi.us'; 'grant.huber@legis.state.wi.us'; Noah Fiedler (E-mail); 'Rick J.W. Petri'
Cc: Theo, Mike - VP Public Affairs; Malkasian, Bill - EVP
Subject: Comments on LBP Rules



LBPrulerevMemDPC1.

doc

Attached is a memo on the current proposed LBP rules. As you will see it is about 100 pages shorter than any of my prior memos. This reflects a significant amount of progress made by DHFS on technical and practical issues in the rules. I have a couple of concerns remaining and ultimately all interested parties will need to review the regulations for lead registry properties to confirm that the standards established are appropriate. Don't hesitate to call if you have any specific questions.

<<LBPrulerevMemDPC1.doc>>

Rick Staff, General Counsel
Wisconsin Realtors Association
Work (608)242-2265
Fax (608)242-2279

This e-mail message is intended solely for the person to whom it is addressed and may contain confidential and/or privileged information. If you have received this e-mail message in error, but are affiliated with the person to whom it is addressed, please notify the addressee that the e-mail has been received (otherwise delete it). Any review, dissemination, copying, printing or other use of this email message by persons other than the addressee is prohibited.

;

MEMORANDUM

To: Interested Persons

From: Rick Staff, General Counsel, Wisconsin REALTORS® Association

Date: November 6, 2001

Subject: Comments on Proposed HFS 163 Lead-Registry Rules

The following comments refer only to those sections of the proposed recreation of Chapter DHFS 163 which are applicable to lead-registry properties. The current draft reflects a significant effort on the part of the DHFS staff and other interested parties to craft rule language that ensures that registry properties are free of lead hazards throughout the life of a lead free/safe certificate. At least five major redrafts of the rules have resulted in regulations which are based on and consistent with Act 113 as well as the balance of Wis. Stat. Chapter 254.

A small number of issues require further clarification prior to promulgation. It is also likely that following review of the initial implementation of the program additional rule revisions will be necessary. Most of the LTAC report has been adopted, albeit often in spirit more than in letter. The LTAC recommendations proposed a new regulatory paradigm based on regulation of high risk and low risk activities. DHFS made a good faith effort to draft rules based upon this model but was unable to develop rules using the LTAC paradigm due to a variety of legal and practical obstacles. By maintaining more of the current regulatory model DHFS overcame drafting challenges which arise when one drafts from "whole cloth." DHFS made significant progress in balancing the need for DHFS oversight of the registry program with the need to minimize the administrative burden on owners of registry properties. In addition, the current proposal does a much better job of simultaneously fulfilling the often conflicting goals of occupant protection and efficient utilization of lead paint hazard reduction resources.

Below are several areas of discussion. These discussions are not a comprehensive review of the rule proposal and should not be relied upon as such.

I. CERTIFICATION REQUIREMENTS.

The proposed rules substantially maintain the current statutory and administrative rule standards regarding certification requirements for abatement and investigation activities. Legislative Council has opined that DHFS has the statutory authority to require certification of persons performing non-abatement lead-based paint activities (see Appendix A) – in other words, interim controls. Accepting this conclusion for the sake of discussion, it is necessary to examine the certification scheme within the DHFS proposal to determine if a proper balance between the sometimes conflicting goals has been struck.

In § HFS 163.42(3), as a condition for maintaining a lead-safe certificate, persons performing abatement activities, lead investigation activities or non-abatement lead-based paint activities requested or allowed by the owner must hold an appropriate certification. While

abatement and lead investigation activities require certification regardless of the property involved, registry properties are treated differently when it comes to interim controls and other non-abatement activities – persons performing these activities must be certified when working on registry properties while no such requirement exists when they work elsewhere. These requirements exceed those for non-registry properties, but the Wisconsin Legislative Council staff has opined that the additional certification requirement for registry properties is lawful.

When a non-abatement lead-based paint activity is conducted by the property owner or the property owner's agent or employee, the person must have the lead-safe worker certification. When an owner requests or allows a non-abatement lead-based paint activity to be conducted by a person other than the owner or the property owner's agent or employee, the owner must ensure that the person is certified (unless exempt). The certification requirements generally exempt work disturbing two square feet of lead paint or less (unless high risk methods are used) as well as the usual exclusions for credentialed trades people. The other key to the exclusion is that the owner would not have to ensure the certification of persons the owner has not requested or allowed to perform the non-abatement lead-based paint activity. The proposal specifically recognizes that a landlord with a rental agreement provision prohibiting a tenant from performing a non-abatement lead-based paint activity is not "allowing" a non-abatement lead-based paint activity. *DHFS staff has indicated that they would expand this "safe-harbor" to prohibitions in a landlord's rules but this provision has not yet been included in the draft.*

The proposal also establishes a certification requirement independent of the owner's conditions for maintaining a lead-safe certificate. Persons (such as tenants – with exceptions) who disturb more than two square feet of lead paint must be certified. While enforcement of this provision may not occur frequently, this requirement is beneficial as it clearly establishes an independent duty for tenants to comply with Chapter HFS 163.

When certification is required, these persons must obtain certification as a lead-safe worker under § HFS 163.43. This certification can be obtained by taking one 8-hour course and paying a one-time \$50 fee.

II. LEAD-SAFE PROPERTY STANDARDS

The standards a property must meet in order to receive a lead-safe certificate have been substantially revised to eliminate technical concerns with prior drafts. The property standards appear to be generally consistent with the LTAC's recommendation. One area that may need additional attention is DHFS standard for floors (§ HFS 163.42(1)(h)) which requires all interior and exterior floors to have an intact protective covering or topcoat in order for a property to obtain a lead-safe certificate. This appears to be an error as it is inconsistent both with the LTAC recommendation and the standards for one-year lead-safe certificates:

3. 'One year.' The presence of any of the following conditions shall result in a certificate of lead-safe status being issued for no more than one year unless the paint is proven to be lead-free.

a. Paint is present on an interior floor, traffic area of an interior stair tread, drawer of a built-in cabinet, malfunctioning door, or on any other interior friction surface not otherwise described and the painted friction surface is not covered by a durable material or by carpeting that protects the paint from abrasion.

Reviewers with technical expertise related to the standards for a lead-safe investigation should also review the protocol to determine if it is appropriate.

III. TERM OF A LEAD SAFE CERTIFICATE

The standards establishing the term of a lead-safe certificate are both more flexible and more restrictive than the LTAC recommendation. DHFS does allow a nine-month certificate when there are friction and impact surfaces, while LTAC did not. This is an important addition to allow “mom and pop” property owners sufficient time to make modifications that can earn them a certificate with a longer term.

As a general rule, the DHFS proposal is stated in much broader terms than the LTAC proposal. One example of this is the standards for floors. LTAC distinguished between traffic areas and low traffic areas/storage rooms. A question which should be addressed is whether the rule’s lack of detail regarding lead-safe certificate terms is resolved by the following language (as DHFS staff indicates):

To determine the expiration date, select the shortest duration under subds. 2. to 7. based only on the components subject to the lead-safe investigation under sub. (2) (a) 2.

2. ‘Locations investigated.’ The registered lead-safe property covered by a certificate is limited to those locations subject to the lead-safe investigation under one or more of the following subd. pars., except that all dwelling units are included when a random selection process under subd. par. c. is successfully used:

DHFS argues that the language “locations subject to the lead-safe investigation” is adequate to exclude investigation of, for example, floors which the LTAC described as “low traffic areas and storage areas.” Persons with technical expertise should review the lead-safe investigation protocol to determine if the following language does, in fact, exclude “low traffic and storage area floors.”

2. ‘Locations investigated.’ The registered lead-safe property covered by a certificate is limited to those locations subject to the lead-safe investigation under one or more of the following subd. pars., except that all dwelling units are included when a random selection process under subd. par. c. is successfully used:

Note: *Subdivision paragraphs a. to c. apply to dwellings and subd. par. d. applies to other premises that are not dwellings, such as child-occupied facilities.*

a. When a certificate of lead-safe status is being sought for a single dwelling unit, the locations investigated shall include the dwelling unit for which the certificate is being sought and all interior and exterior common areas for the real property associated with the dwelling where an occupant of the dwelling unit might be exposed to a lead-based paint hazard.

Generally speaking, the remaining (longer term) lead-safe certificates are reduced in length from the terms recommended by LTAC. Although it is an over-generalization, five year terms are reduced to three years, fifteen years to ten, etc. Those with the requisite technical knowledge will have to judge whether the modification of the LTAC recommendation has been based on “research.”

IV. CONDITIONS FOR MAINTAINING A CERTIFICATE

This section has benefited the most from DHFS revisions. There has been a significant effort to allow sufficient flexibility to landlords so that notices, inspections, lead-hazard reductions, etc. can be performed in an efficient manner without undue administrative burdens. There remain substantial responsibilities for owners who wish to maintain a lead-safe certificate, however, the current proposal is significantly less burdensome and has far greater recognition of the realities of landlord/tenant relationships than earlier drafts. Examples include the flexibility to schedule inspections at turn-over time, simplification of information delivery procedures, and limiting fast-track clean-ups to situations where the owner has knowledge of an occupant six years of age or younger.

One substantial problem remains. The obligation to distribute materials at the start of an tenancy is fatally flawed because the definition of "tenancy" includes an "occupancy." Therefore, an owner would have a duty to make new disclosures at such time as there are new occupants. This is unworkable because landlords do not have the ability to control occupancy (even when lease provisions would prohibit other occupancies).

163.42(3)(b) 6. 'Timing for distribution at the start of tenancy. The property owner shall ensure that distribution of materials under subds. 3. and 4. is completed prior to the start of tenancy.

163.03(107) "Tenancy" means occupancy, or a right to present occupancy under a rental agreement, and includes periodic tenancies and tenancies at will. The term does not include the occupancy of a dwelling unit without consent of the property owner after expiration of a lease or termination of tenancy under ch. 704, Stats.

V. WORK PRACTICE STANDARDS

The concept of the work practice standards is that all activities which disturb lead-based paint should be done so in a manner that does not create lead-paint hazards for the occupants of the property. DHFS has made significant revisions to prioritize the work practice standards that are applicable to the levels of "risk" inherent in specific lead paint activities. The rules begin by having the owner notify persons working for the owner who will be disturbing paint that they are subject to safe work practice standards. Actual work practices vary depending on the risk inherent in the activity, kicking in when two square feet of paint are disturbed and increasing as high risk activities are conducted. Persons with technical expertise will need to review the work practice standards to determine if the standards appropriately reflect the risk involved in the activity.

(g) *Conduct clearance.* 1. When the property owner requests or allows a non-abatement lead-based paint activity to be conducted, the property owner shall ensure that clearance is conducted as required under s. HFS 163.44 (6).

This standard requires revision as the clearance standard is no longer at § HFS 163.44(6).

VI. DEFINITION OF EMPLOYEE

The term "employee" is used in several contexts, two of which are particularly important to the registry program. Employees are identified along with owners and agents for a variety of regulations relating to the lead paint activities associated with registry properties. "Employee" is also used to describe those individuals whose association with the owner makes it impossible for them to be sufficiently independent to perform an objective lead paint investigation.

The difficulty with the proposed definition in these two contexts is that there is no nexus between the definition and those people who would engage in lead paint activities in registry properties or those persons who would not be "independent" for the purpose of a lead paint investigation. The definition of an "employee" would exclude all legal entities and all individuals who file self employment tax returns. This does not hurt property owners particularly but the rules should regulate those persons intended to be regulated.

The definition of agent is actually the definition of an employee. The use of the two terms "agent" and "employee" were intended to address persons performing the same types of tasks/jobs. Both terms were used in order to include all persons performing these functions, regardless of the nature of the relationship between the owner and the person working for the owner.

I would propose the following:

"Agent" "Employee" means a person who is under a contract with the owner to manage or maintain the owner's real property as directed by the owner.

"Agent" means a person who has been authorized by the owner to manage or maintain the owner's real property on the owner's behalf.

Current Proposal

163.03 (5) "Agent" means a person who is under a contract to manage or maintain real property.

163.03 (41) "Employee" means an individual who an employer can require or direct to engage in any employment, or to go to work or to be at any time in any place of employment, except that an employee does not include an individual who meets the criteria under s. 108.02 (12) (b) 1. and 2., Stats.

Wis. Stats 108.02(12)(b) During the period beginning on January 1, 1996, and ending on December 31, 1999, and during the period beginning on January 1, 2004, with respect to contribution requirements, and during the period beginning on January 1, 1996, and ending on April 1, 2000, and during the period beginning on April 4, 2004, with respect to benefit eligibility, par. (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that:

1. The individual:
 - a. Holds or has applied for an employer identification number with the federal internal revenue service; or
 - b. Has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year; and
2. The individual meets 6 or more of the following conditions:
 - a. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.
 - b. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and method of performing the services.
 - c. The individual incurs the main expenses related to the services that he or she performs under contract.
 - d. The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.

- e. The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.
- f. The individual may realize a profit or suffer a loss under contracts to perform services.
- g. The individual has recurring business liabilities or obligations.
- h. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

APPENDIX A

**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

TO: REPRESENTATIVE TOM SYKORA
FROM: Mary Matthias, Senior Staff Attorney
RE: Proposed Chapter HFS 163, Wis. Adm. Code, Relating to Lead-Based Paint
DATE: October 22, 2001

This memorandum responds to your request for a discussion of whether certain provisions in the proposed recreation of ch. HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of the certificates of lead-free status and lead-safe status, are within the statutory authority of the Department of Health and Family Services (DHFS). Specifically, you question whether DHFS has authority under ch. 254, Stats., particularly the provisions of that chapter which were created by 1999 Wisconsin Act 113 (Act 113), to establish certain training and certification requirements for persons who disturb lead-based paint on their own registered lead-safe property. This memorandum also addresses your questions regarding the impact of the statutory requirement to "maintain consistency with federal law" on the department's authority to promulgate the rules at issue. Finally, this memorandum answers a question you have raised regarding the performance of lead-based paint activities by tenants in registered properties.

In short, it appears that Act 113 does confer authority to the department to establish and enforce the training and certification requirements at issue and that the rules establishing the requirements meet the statutory requirement to maintain consistency with federal law.

Potential Conflict Between ss. 254.176 (2) (a) and 254.179 (1), Stats.

You have asked whether the proposed rules establishing training and certification requirements for persons whose lead-based paint activities are limited to interim control activities in registry properties, set forth in proposed ss. HFS 163.43 and 163.44, are in conflict with s. 254.176 (2) (a), Stats., which states that certification is not required for persons whose activities are limited to interim control activities.

Section 254.176 (1), Stats., which was in effect prior to the enactment of Act 113, provides that the department may establish, by rule, certification requirements for any person who performs lead hazard reduction or a lead management activity or who supervises the performance of any lead hazard reduction or lead management activity. Section 254.176 (2) (a), Stats., provides as follows:

No certification is required under this section for lead hazard reduction conducted by any of the following persons, unless the lead hazard reduction is being done to comply with an order by the department or

another state or local agency that requires the use of persons certified under this section:

A person whose activities are limited to interim control activities, unless the activities are directly funded by a grant from the federal department of housing and urban development. [s. 254.176 (2) (a), Stats.; Emphasis added.]

Act 113 created s. 254.179 (1), Stats., which authorizes the department to promulgate, as rules, the standards which must be met for issuance of a certificate of lead-free status or a certificate of lead-safe status, the procedures by which a certificate may be issued or revoked, and the period of validity of certificates, including, among other things:

The standards limiting the length of validity of a certificate of lead-safe status, including the condition of a premises, dwelling or unit of a dwelling, the type of lead hazard reduction activity that was performed, if any, *and any other requirements that must be met to maintain certification*, unless the certificate is earlier revoked because of erroneous issuance or because the premises, dwelling or unit of the dwelling is not safe from lead-bearing paint hazards [s. 254.179 (1) (c) 2., Stats.; Emphasis added.]

The issue is whether the statement, in s. 254.176 (2), Stats., that: “No certification is required under this section for . . . [a] person whose activities are limited to interim control activities . . .” prohibits the department from requiring certification of persons performing interim control work on registry properties under the authority granted in s. 254.179 (1), Stats., to establish “ . . . any other requirements that must be met to maintain certification” As discussed below, it appears that the limitation in s. 254.176 (2), Stats., does not apply to rules implementing the registry program.

First, as noted above, s. 254.176 (2) (intro.) and (a), Stats., provides in pertinent part that: “No certification is required *under this section*” Typically, the phrase “under this section” limits the applicability of the provision to which it refers to the statutory section in which the provisions appear. For example, the applicability of statutory definitions is usually limited to a specified section, subchapter or chapter of the statutes by use of the phrase “In this section,” “In this subchapter” or “In this chapter.” It seems reasonable to conclude that in this case, the phrase “under this section” limits the exemption from certification to rules promulgated under that statutory section, which does not address and was in place prior to the establishment of the registry program.

In addition, s. 254.176, Stats., was enacted several years prior to the enactment of Act 113. If the exemption from certification requirements was clearly intended to apply to the rules implementing the registry program, Act 113 would have amended the phrase “in this section” in s. 254.176 (2), Stats., to “in this chapter” or would have otherwise made the exemption clearly applicable to the registry program.

Perhaps most indicative of legislative intent on this issue, Act 113 appears to specifically provide for the establishment of additional training and certification requirements for interim

control activities undertaken in registry properties. Act 113 requires the department to promulgate, as rules, "The requirements for a course of up to 16 hours that a property owner or his or her employee or agent may complete in order to receive certification of completion and the scope of lead investigation and *lead hazard reduction* activities that the owner, employee or agent may perform following certification, to the extent consistent with federal law." [s. 254.179 (1) (e), Stats.; Emphasis added.] "*Lead hazard reduction*" is defined as "actions designed to reduce human exposure to lead hazards, including lead hazard abatement and *interim control activities* involving lead-bearing paint or lead-contaminated dust or soil or clearance activities that determine whether an environment contains a lead hazard." [s. 254.11 (8n), Stats.; Emphasis added.] Because the term "lead hazard reduction" includes interim control activities, it appears that s. 254.179 (1) (e), Stats., authorizes the department to require a property owner or his or her employee or agent to complete training of up to 16 hours in order to be permitted to perform certain lead hazard reduction activities, including interim control activities, on their property.

Finally, if a court found ambiguity in the statutory language pertaining to the department's authority, it would likely look to the statement of legislative findings and purpose to clarify the Legislature's intent. The statement of purpose in Act 113, set forth in s. 254.173 (1) "Legislative Findings and Purpose," appears to indicate that the primary purpose of Act 113 is to protect the public health. Specifically, s. 254.173 (1) (a), Stats., contains legislative findings which describe the extent of lead poisoning among children in the United States and Wisconsin and the dangers posed by "even relatively low blood lead levels." Further, s. 254.173 (1) (b), Stats., provides, in part, as follows: "The purpose of these standards and this restriction on liability is to reduce the exposure of children and others to lead-bearing paint, thereby substantially reducing the number of persons who develop lead poisoning or lead exposure." Because the legislative findings and purpose emphasize health concerns, it appears likely that if a court found the statute to be ambiguous, it would find that the Legislature's intent would be best implemented by resolving the ambiguity in favor of authorizing the department to establish training and certification requirements designed to reduce the exposure of children and others to lead-bearing paints.

Requirement to Maintain Consistency With Federal Law

You have asked how several provisions in ch. 254, Stats., pertaining to consistency with federal law affect the authority of DHFS to establish training and certification requirements for persons whose lead-based paint activities are limited to interim control activities in registry properties.

The first provision pertaining to consistency with federal law which you have cited is a version of 254.172 (intro.), Stats., which was repealed by Act 113 as of September 1, 2001, and therefore, is inapplicable. That statutory provision required, in part, that any rules promulgated under s. 254.176, entitled "Certification Requirements," "shall meet, but not exceed, any requirement under regulations promulgated by the administrator of the federal environmental protection agency under section 402 of the federal toxic substances control act, as created under s. 1021 of P.L. 102-550." Act 113 repealed and recreated this section to read, in part, that "the department may promulgate rules governing lead hazard reduction that the department determines are consistent with federal law." The impact of the requirement to maintain consistency with federal law is discussed below.

Another provision which you have cited, s. 254.156, Stats., pertains only to the definitions of the terms "lead-bearing paint" and "lead poisoning or lead exposure." The statute requires those definitions to correspond to standards specified by the Centers for Disease Control and Prevention. These definitions are not at issue in the current rule. The fact that the statute contains these specific requirements with regard to only two statutorily defined terms may be evidence of the Legislature's intent to authorize the department to utilize definitions for other terms which are not identical to the definitions used in the federal regulations.

The final provision which you have cited pertaining to consistency with federal law is the requirement, set forth in s. 254.179 (2), Stats., that the department review its rules pertaining to the lead-safe and lead-free registry program and "promulgate changes to the rules if necessary in order to maintain consistency with federal law." [Emphasis added.] The proposed rules require certification of persons who perform certain non-abatement work on any property which has been certified as lead-safe or lead-free. Because federal law does not require certification of any persons who perform non-abatement work or perform any type of lead paint-related work on their own owner-occupied home, you question whether the requirements in the proposed rule are consistent with federal law.

Federal law does not contain a scheme which provides immunity from liability in exchange for compliance with specified standards and conditions. The federal regulations which you have cited, "regulations promulgated by the administrator of the environmental protection agency under section 402 of the federal toxic substances act, as created by section 1021 of P.L. 102-550," only establish requirements for the certification of individuals and firms engaged in lead-based paint activities and work practice standards for performing such activities. While the federal regulations establish specific requirements for performing lead-based paint activities should they be undertaken, the rules do not require any owner or occupant to undertake any particular lead-based paint activity.

Since there are no provisions in federal law which parallel the registry program created by Act 113, the requirement that the registry program rules be consistent with federal law does not appear to require that they be identical to federal law. If this were the case, there could be no registry program in Wisconsin, because the law could not mandate that any particular lead-based paint activity, including inspections, be conducted, since these activities are not required under federal law. Rather, it seems likely that a court would interpret this requirement to mean that the rules must not conflict with federal law. This interpretation is in accord with the decision of the Wisconsin Supreme Court in *Lake City v. Mequon*, 207 Wis. 2d 155, 558 N.W.2d 100 (1997), which interpreted a statutory requirement that a plat could not be approved unless it was ". . . in compliance with . . . any local master plan which is *consistent with* any . . . official map adopted under s. 62.23." [Emphasis added.] In that case, the parties disputed the meaning of "consistent" in the statute. The Lake City Corporation argued that any portion of a master plan that deals with issues not covered by an official map is inconsistent with the official map. The City of Mequon argued that the statute required any issues which were addressed in both a master plan and an official map to be consistent and if that requirement were met, a master plan could be consistent with an official map even if it addressed issues not included in the official map.

The court agreed with the City of Mequon. The court stated:

The word “consistent,” according to common and approved usage, means “in agreement; compatible.” [The American Heritage Dictionary, page 402 (3d Ed. 1992).] In other words, “consistent” means “not contradictory.” Under the common sense application of this definition to the present case, a master plan is consistent with an official map if they share common elements, meaning that any elements addressed by both the master plan and official map are in agreement.

However, it does not necessarily follow that a master plan is inconsistent with an official map if the master plan contains elements that the official map does not. The master plan, pursuant to s. 62.23 (2), Stats., is likely to contain additional elements. Yet, a master plan is not incompatible with an official map simply because the master plan contains additional elements. So long as any issues addressed in both the master plan and an official map are not contradictory, the master plan is consistent with the official map. [*Lake City v. Mequon*, 207 Wis. 2d at 164, 558 N.W.2d at 104.]

Applying this interpretation of “consistent” to the present issue, it appears that because the federal law does not contain a registry program, a court would interpret the requirement that the rules be consistent with federal law to require that any issues addressed by both the rules and the federal law be in agreement. It appears that the provisions in ch. HFS 163 which address issues which are also addressed by federal law are consistent with those provisions of federal law. Therefore, it appears that the statutory requirement that the rules be consistent with federal law has been met.

Lead-Based Paint Activities Performed by Tenants

You have asked whether proposed ch. HFS 163 requires a tenant performing lead-based paint activities in a registry property with the permission of the owner to meet the same certification requirements as the owner would be required to meet if he or she were performing the work. It appears that s. HFS 163.43 applies the certification requirements uniformly to all persons performing a lead-based paint activity on a registered lead-safe property. The degree of certification required is determined by the degree of risk associated with the activity undertaken, not by the identity of the person performing the work. Section HFS 163.43 (1) (e) identifies circumstances under which work may be undertaken by persons who are not certified. These appear to be the only circumstances under which any noncertified person may perform a lead-based paint activity on registered lead-safe property. Specifically, s. HFS 163.43 (1) (e) provides as follows:

Certification is not required under this chapter when any of the following applies:

1. All activities are within the scope of a license, certification or registration issued to the individual by the department of commerce under s. 101.178, 101.87 or ch. 145, Stats.
2. The only activities performed involve installation or repair of wiring, cables or components of the dwelling’s security, electrical, heating, plumbing or cooling systems.

3. All paint disturbed by the activity has been tested by a person certified in an appropriate lead investigation discipline, who has determined that the paint does not meet the definition of lead-based paint under s. HFS 163.03 (65).
4. Lead-based paint activities are performed that meet all of the following criteria:
 - a. The activities do not involve lead abatement.
 - b. The total amount of paint to be disturbed is equal to or less than 2 square feet.
 - c. Activities are not a series of small jobs performed that would require certification if performed sequentially, such as activities conducted in response to a visual inspection or notification of a potential lead-based paint hazard.
 - d. The activities are conducted in compliance with applicable work practice standards under s. HFS 163.44.

[s. HFS 163.43 (1) (e), Wis. Adm. Code.]

Please contact me at the Legislative Council Staff offices if you have any further questions or would like more information. My direct telephone number is 266-0932.

MM:ksm;jal;tlu

Huber, Grant

From: Hess, Martha
Sent: Monday, November 12, 2001 2:18 PM
To: Huber, Grant
Subject: RE: Wednesday's meeting

It's in the North Hearing Room

pardon my abbreviations:

Sen. Jauch
Sen. Meyer
Realtors--Mike Theo and Rick Staff
The Apt. Association
The SE apartment association
Rep. Coggs

-----Original Message-----

From: Huber, Grant
Sent: Monday, November 12, 2001 1:56 PM
To: Hess, Martha
Cc: Whitesel, Russ
Subject: Wednesday's meeting

Hi Martha,

I know that the lead paint meeting is this Wednesday at 11 AM. However, I don't recall what room you said.

Also could you share with us a list of people who have been invited?

Thanks,

Grant



Mark Meyer

State Senator • 32nd Senate District

November 13, 2001

TO: Members, Senate Committee on Universities, Housing and Government Operations

FROM: Senator Mark Meyer

RE: Lead Paint rules (Update)

Please find attached a letter submitted by the Department of Health and Family Services (DHFS) seeking additional germane modifications to Clearinghouse Rule 00-172. Those modifications are attached.

As you recall, DHFS had requested germane modifications on October 29th, which extended the Committee's review period to November 16th. According to Legislative Council, the submission of these additional germane modifications will now extend the committee's review period until **December 3rd**. (The DHFS letter had incorrectly noted the date as November 27)

I will keep you apprised of any further changes concerning the status of this clearinghouse rule.





State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

November 12, 2001

The Honorable Mark Meyer, Chairperson
Senate universities, Housing and Government Committee
Room 131 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Meyer:

On October 29th, our Department submitted to your office germane modifications to Clearinghouse Rule 00-172. Our submission extended your committee's review period for 10 additional working days. Under s. 227.19 (4) (b) 3., Stats., our Department is submitting with this letter an additional germane modification to CR 00-172. The Department has modified two additional provisions of proposed ch. HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits this germane modification, contained on the following page, for your committee's consideration.

It is our understanding that this submission extends your committee's review until November 27, 2001.

Sincerely,

A handwritten signature in cursive script that reads "Phyllis J. Dubé".

Phyllis J. Dubé
Secretary

attachment

HFS 163.41 (3) (c) The lead-free inspection does not support that the property meets the registered lead-free property standards under sub. (1) because the lead-free inspection protocol under sub. (2) was not followed in determining that the dwelling, dwelling unit, child-occupied facility or other premises met the standards for registered lead-free property and a subsequent lead-free inspection does not verify that the dwelling, dwelling unit, child-occupied facility or other premises met the lead-free standards.

HFS 163.42 (5) (g) The lead-safe investigation does not support that the property meets the registered lead-safe property standards under sub. (1) because the lead-safe investigation protocol under sub. (2) was not followed in determining that the property met the registered lead-safe property standards and a subsequent lead-safe investigation did not verify that the property met the lead-safe standards.



State of Wisconsin
Department of Health and Family Services

Scott McCallum, Governor
Phyllis J. Dubé, Secretary

December 11, 2001

The Honorable Mark Meyer, Chairperson
Senate Universities, Housing and Government Committee
Room 131 South, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

Dear Senator Meyer:

On November 27th, our Department submitted to your office a third set of germane modifications to Clearinghouse Rule 00-172. Our submission extended your committee's review period for 10 additional working days. Under s. 227.19 (4) (b) 3., Stats., our Department is submitting with this letter a fourth set of additional germane modifications to CR 00-172. The Department has modified additional provisions of proposed ch. HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status, and hereby submits these germane modifications for your committee's consideration.

It is our understanding that this submission extends your committee's review until December 26, 2001.

Sincerely,

A handwritten signature in cursive script that reads "Phyllis J. Dubé".

Phyllis J. Dubé
Secretary

attachment

12-11-2001 Germane Modifications

s. **HFS 163.03 (41)** "Employee" means an individual who an employer can require or direct to engage in any employment, or to go to work or to be at any time in any place of employment, except that an employee does not include an individual ~~who meets the criteria under s. 108.02 (12) (b) 1. and 2., Stats., and whose~~ sole relationship with the employer is contractual and limited to performing periodic services for which the individual, not the employer, controls the means and method of performing the services and the individual meets the criteria under s. 108.02 (12) (b) 1. and 2., Stats.

s. **HFS 163.14 (5) (b) 3.** For registered lead-safe property, a person may not conduct clearance of a non-abatement lead-based paint activity subject to restricted work practices under s. HFS 163.44 (3) (d) or an abatement activity unless the person meets all of the criteria under s. HFS 163.40 (2) (c) ~~3.-e. to f.~~

s. **HFS 163.40 (2) (c) 3.** 'Who may sample or test paint for a lead-free inspection or lead-safe investigation.' To be included in a lead-free inspection or lead-safe investigation, sampling or testing of paint shall be conducted by an individual appropriately certified person who is:

~~a. Certified in an appropriate lead investigation discipline.~~

~~b. Associated with a lead company that is certified under s. HFS 163.12.~~

~~e.a.~~ Not a property owner, or an immediate family member, agent or employee of a property member.

~~d.b.~~ Not a lead company or associated with a certified lead company that is directly or beneficially owned, controlled or managed by the property owner, or by an immediate family member, agent or employee of the property owner.

~~e.c.~~ Not a person hired by or under contract with the property owner to manage or maintain the property owner's real property as directed by the property owner.

~~f.d.~~ Not a person who has been authorized by the property owner to manage or maintain the property owner's real property on the property owner's behalf.

e. Not a person who has a financial interest in the laboratory results of the sampling or testing or in the determination of whether the property meets the registered lead-free property standard or the registered lead-safe property standard.

s. **HFS 163.42 (1) (h).** *Painted floors and stairs.* Painted interior and exterior floors and the traffic area of stair treads ~~shall have an intact protective covering or topcoat that does not contain lead-based paint~~ shall be free of deteriorated paint and evidence of abrasion unless all existing paint on the floor or stair tread is proven to be lead-free.

s. **HFS 163.42 (2) (e)** *Expiration date.* 1. 'General criteria for determining the expiration date.' For property meeting the registered lead-safe property standards under sub. (1), a certificate of lead-safe status shall be given an expiration date based on the component that is

most likely to cause or become a lead-based paint hazard before any other component. A component that is proven to be lead-free shall be excluded from consideration. A component that has been enclosed or encapsulated according to documented methodologies shall be excluded from consideration under subds. 1 to 5. To determine the expiration date, select the shortest duration under subds. 2. to 7. based only on the components subject to the lead-safe investigation under sub. (2) (a) 2.

2. 'Nine months.' The presence of paint on an impact or friction surface of a window well or trough, window channel, or window sash shall result in a certificate of lead-safe status being issued for no more than 9 months when paint is not proven to be lead-free and the painted surface is not enclosed by a durable material that protects the paint from impact and abrasion.

Note: The 9-month certificate is intended to allow recognition of temporary measures, such as removing dust-lead and debris created by impact and friction, while more permanent lead hazard reduction continues. Under sub. (4), no more than 2 applications for a 9-month certificate may be submitted unless the property owner provides the department with a reason why an additional 9-month certificate is necessary.

3. 'One year.' The presence of any of the following conditions shall result in a certificate of lead-safe status being issued for no more than one year unless the paint is proven to be lead-free.:

a. In a dwelling unit or common area, paint is present ~~under an intact lead-free topcoat of an interior on a floor or the traffic area of an interior stair tread~~ and the painted surface is not covered by an intact lead-free topcoat or by a durable material or by carpeting that protects the paint from abrasion.

b. In ~~an interior~~ a dwelling unit or common area ~~that is likely to be subject to daily traffic, such as a laundry, entry hallway or stairway between floors of apartments,~~ paint is present under an intact lead-free topcoat of ~~a floor or the traffic area of a stair tread~~ and the painted surface is not covered by a durable material or ~~by carpeting~~ that protects the paint from abrasion.

c. Paint is present on a drawer of a built-in cabinet, malfunctioning door, or on any other interior friction surface not otherwise described and the painted friction surface is not covered by a durable material that protects the paint from abrasion.

d. Deteriorated paint is present on the exterior, but only at a height above 5 feet from ground or floor level, and the total amount of deteriorated paint is less than 5 square feet.

4. 'Three years.' The presence of any of the following conditions shall result in a certificate of lead-safe status being issued for no more than 3 years unless the paint is proven to be lead-free.:

a. Paint is present on an exterior sill, interior sill or stool, casing, head, jamb, glazing, caulk, putty or any other component of a window that is not an impact or friction surface under subd. 1.

b. Paint is present and exposed on any exterior horizontal surface or any of the following exterior components: floor, porch, stair system.

c. Other than paint on a window well or trough under subd. 1., paint is present and exposed to damage by the impact of another component striking the painted component, such as a door striking a baseboard or chair rail.

d. Paint is present on an interior or exterior door.

e. A component shows evidence of mold, mildew, moisture or water damage where paint is present, but no evidence of an active leak.

f. In a dwelling unit or common area, paint is present under an intact lead-free topcoat of a floor and the painted surface is not covered by a durable material or carpeting that protects the paint from abrasion.

g. In an enclosed area that is locked and secured against access by occupants other than the property owner or the property owner's family, agent or employee, paint is present on a floor or the traffic area of a stair tread and the painted surface is not covered by a lead-free topcoat or by a durable material or carpeting that protects the paint from abrasion.

5. 'Five years.' Unless the paint is proven to be lead-free, the presence of paint on an exterior component not described under subds. 1. to 3., 5. or 6., such as siding, porch ceiling, gutter, downspout, soffit or fascia, shall result in a certificate of lead-safe status being issued for no more than 5 years.

6. 'Ten years.' Unless the paint is proven to be lead-free, the presence of paint on an interior component that is not described under subds. 1. to 3., 5. or 6., such as a wall, ceiling or painted floor covered by wall-to-wall carpeting, shall result in a certificate of lead-safe status being issued for no more than 10 years.

7. 'Twenty years.' A certificate of lead-safe status shall be issued for no more than 20 years when all paint that has not been proven to be lead-free has been fully enclosed with durable material that does not allow dust or debris from the paint to escape into the environment.

s. HFS 163.42 (3) (e) 4. Under this paragraph, the property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.42 (3) (f) 3. Under this paragraph, a property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules for the property were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.42 (3) (g) 2. Under this paragraph, a property owner is deemed to not allow the occupant to conduct the activity under any of the following circumstances:

a. When the property owner can demonstrate that the occupant received a written rental agreement that prohibits the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

b. When the property owner can demonstrate that the occupant received the property owner's written rules prohibiting the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

c. The property owner's written rules for the property were posted where the occupant should reasonably have been expected to see the prohibition and the rules prohibit the occupant from disturbing paint and performing lead-based paint activities on the property without certification.

s. HFS 163.43 (2) (c) 1. The total amount of paint to be disturbed during any one project, such as all activities conducted in response to a visual inspection or notification of a potential lead-based paint hazard, is equal to or less than 2 square feet when all paint to be disturbed in all dwelling units and common areas involved in the project are added together and the activity is not, including all paint disturbed when the project is conducted as a series of small jobs that would total more than 2 square feet, such as activities conducted in response to a visual inspection or notification of a potential lead-based paint hazard.

s. HFS 163.43 (2) (c) 1. Note: An example of a small job that would not require certification is scraping less than 2 square feet of paint in a dwelling unit when preparing to paint at turnover. However, if the rental agreements of multiple units expire at the same time, the preparation of those units would be one project and the scraping for all units would be added together.

s. HFS 163.43 (2) (e) Certification is not required when an occupant repairs nail holes at the end of tenancy and all of the following apply:

1. The total amount of paint to be disturbed during the repair of nail holes in the occupant's unit is equal to or less than 2 square feet.

2. The occupant receives no compensation for performing the repair.

PROPOSED ORDER OF THE
DEPARTMENT OF HEALTH AND FAMILY SERVICES
REPEALING AND RECREATING RULES

To repeal and recreate chapter HFS 163, relating to certification for the identification, removal and reduction of lead-based paint hazards and the issuance and registration of certificates of lead-free status and lead-safe status.

Analysis Prepared by the Department of Health and Family Services

Chapter 254, Stats., provides for a comprehensive lead (Pb) hazard reduction program, including lead exposure screening, medical case management and reporting requirements, and the development of lead training accreditation and certification programs. Under the authority of Chapter 254, Stats., the Department promulgated Chapter HFS 163, Wis. Adm. Code, in 1993 to provide a rule for the certification of individuals performing lead hazard reduction and for the accreditation of the courses that prepare individuals for certification. This rule has been revised over time to meet new requirements of the U.S. Environmental Protection Agency (EPA).

Wisconsin met federal standards for a state-administered lead training accreditation and certification program and received EPA authorization effective January 27, 1999. The Department's Asbestos and Lead Section of the Bureau of Occupational Health administers and enforces lead-based paint training, certification and work practice provisions of Chapter HFS 163, Wis. Adm. Code. The Section derives its revenues from two sources: various fees the Department assesses under this chapter and lead program development grant monies the Department receives from EPA.

Under Chapter HFS 163, Wis. Adm. Code, a person offering, providing or supervising lead investigation activities or lead-based paint activities for which certification is required must be certified as a lead company and may only employ or contract with appropriately certified individuals to perform these activities. Effective December 1, 2000, the Department revised the training accreditation and certification requirements of the rule by emergency order. An individual may apply for certification in the following disciplines: lead low-risk worker, low-risk supervisor, high-risk worker, contractor supervisor, sampling technician, inspector, hazard investigator, risk assessor and project designer.

For initial certification, the individual must be 18 years of age or older, must meet applicable education and experience qualifications, must successfully complete certification training requirements. To be certified as a lead hazard investigator, inspector, risk assessor, low-risk supervisor or contractor supervisor, the individual must also pass a certification examination. In addition, the Department must accredit the lead training courses that prepare persons for certification.

New Wisconsin Law

On May 22, 2000, the Governor signed 1999 Wisconsin Act 113 into law. Act 113 requires the Department to review local ordinances and promulgate a rule to implement Act 113 using a research-based methodology. Further, the Act directed the Department to consult with an advisory committee on the proposed rule. This rule must establish all of the following:

- Standards that a premises, dwelling or unit of a dwelling must meet for issuance of a certificate of lead-free status or lead-safe status.

- A process for issuing the certificates and registering the properties for which certificates are issued.
- Procedures for revoking a certificate, and the period of validity for a certificate.
- The interim lead hazard control measures a new owner must take in vacant units when immunity from liability is provided during the first 60 days after acquiring a new dwelling.
- The requirements for a training course of up to 16 hours that property owners, their agents and employees may complete to become certified.
- The scope of the lead investigation and lead hazard reduction activities that a property owner, or the property owner's agent or employee may perform following training and certification, to the extent consistent with federal law.

If a dwelling unit has a valid certificate of lead-free or lead-safe status when a person who resides in or visits the unit is lead poisoned, the property owner, and his or her agents and employees are conditionally immune from civil and criminal liability for their acts or omissions related to the lead poisoning or lead exposure.

New Provisions

This order proposes adding the following provisions to Chapter HFS 163:

Subchapter I – General Provisions

- Authority and purpose for activities involving registered lead-free or registered lead-safe property.
- The scope of Subchapter V, which the department proposes adding to implement Act 113.
- Definitions required by new provisions of the rule.

Subchapter II – Certification

- For certification as a lead inspector or risk assessor, a requirement that the applicant submit proof of manufacturer's training for the XRF the person will use in inspections.
- Requirement that photo identification be presented for certification if training was not obtained from a Department-accredited training provider.
- Additional responsibilities for lead companies, including disclosure of information about the work to be performed and more information on the quarterly lead investigation activities summary.
- Information about the protocol for conducting elevated blood lead investigations was added to the work practice standards.

Subchapter III – Accreditation

- Requirement to take photographs of students to submit to the Department and insert in training certificates.

Subchapter V - Registry of Property with Certificates of Lead-Free Status or Lead-Safe Status.

- Standards for registered lead-free property and registered lead-safe property.
- Work practice standards and protocols for lead-free inspections and lead-safe investigations, used to determine whether a property meets the standards to be issued a certificate of lead-free or lead-safe status.

- Limitations on who may conduct lead-free inspections and lead-safe investigations.
- The conditions that must be met to maintain a valid lead-safe certificate.
- Procedures for issuing a lead-free or lead-safe certificate, including the establishment of the effective date and expiration date.
- Procedures for a property owner to obtain a mandatory certificate of lead-free or lead-safe status if a child residing in the property has been identified with an elevated blood level.
- What a property owner must do to have temporary immunity for 60 days after acquiring a dwelling or unit. (Not effective before September 1, 2001.)
- Training and certification requirements for persons who disturb lead-based paint on their own registered lead-safe property.
- Work practice standards and protocols for lead-based paint activities that do not involve lead abatement.

Consultation with the Lead Technical Advisory Committee and the Public

As mandated by s. 254.174, Wis. Statutes, the Department created a Lead Technical Advisory Committee (LTAC) to make recommendations to the Department concerning promulgation of lead-based paint rules. Advisory Committee members were selected to represent key interest groups. These groups included lead hazard reduction professionals, lead identification professionals, landlords and other property owners, public health departments, child advocates and day care providers.

The Department charged the LTAC with advising the Department on implementation of statutory changes enacted in 1999 Wisconsin Act 113. The LTAC met on May 26, July 12, August 16, September 8 and September 22 to review reports and recommendations from 14 public forums previously held. The LTAC met again on April 6, 2001, to review revisions to the rule that the Department proposed to make in response to public comments. At the May 26, 2000, meeting, members agreed on the following guiding principles for the rules developed to implement Act 113:

- Focus on protecting the most children possible with current resources.
- Encourage proper maintenance as a means of reducing lead poisoning.
- Encourage wide participation in the registry program.
- Reduce confusion by limiting differences between Department rules and other applicable regulations, such as HUD's lead hazard reduction regulations under 24 CFR Part 35.
- Strive for simplicity and clarity in order to achieve better compliance.
- Be sensitive to costs and the impact costs have on the ability to get work done.
- Reward long-term improvements.
- Encourage work when a building is vacant in order to reduce risks to occupants.
- Enforce the regulations in order to encourage compliance.
- Evaluate the registry process regularly and revise as needed.
- Look for resources to reduce lead-based paint hazards.

The Department's 14 public forums were held in various locations statewide and facilitated relatively wide public participation in the LTAC's development of recommendations. In addition to Department staff and LTAC members, more than 50 people participated in the public forum process. Public forums discussed the following issues:

- Issuance of certificates of lead-free status or lead-safe status.
- Standards buildings must meet to qualify for a certificate.
- Standards for limiting the length of certificate validity.
- Requirements that certificate-holders must meet to maintain a certificate.

- Protocols that a certified lead professional must use when determining whether a building meets the standards for a certificate of lead-free status or lead-safe status.
- Forms for the certificates of “lead-free status” and “lead-safe status.”
- Lead-safe work practices that must be used when conducting an activity that disturbs lead-based paint on a property.
- Training and certification of persons who perform work involving property included in the registry of certificates of lead-free status or lead-safe status.
- Educating the public about the registration of property with a valid certificate of lead-free status or lead-safe status.

Comparison to City of Milwaukee’s Lead Ordinance

Act 113 directs the Department to include a summary of the differences between the standards under this rule and the standards under a lead ordinance for the City of Milwaukee. As the Department’s proposed rule also provides, the Milwaukee lead ordinance authorizes the issuance of a certificate whenever lead-based paint hazards have been controlled. The principal differences between the Milwaukee lead ordinance and what the Department is proposing through this rule involve processes and procedures, not quantitative standards. Under the Milwaukee lead ordinance, Milwaukee Health Department inspectors conduct risk assessments, specify both the work that must be done and the work practices for completing the work, monitor and approve the work, and then verify that a property meets the ordinance requirements based on the unique qualifications of that property. Under the Department’s proposed rule, no prior risk assessment is required and the Department does not have the opportunity to monitor the lead hazard reduction activity unless the required notice is submitted to the Department. Private lead professionals (instead of publicly employed inspectors) conduct the lead investigation to verify that a property meets the registered lead-safe property standards, but these lead professionals will arrive after lead hazard reduction, if any, is completed. Since the quality of the preparation is key to the longevity of most lead hazard reduction, the private lead professionals will not be able to determine if a specific lead hazard reduction should last five years or only 1 year. The Department’s standards, therefore, have to treat all work the same.

The Milwaukee ordinance specifies actions that must be taken to reduce lead-based paint hazards, while the Department’s rule primarily dictates the desired outcome based on EPA’s definition of a lead hazard as proposed in 1998. Rather than mandate specific lead hazard reduction methods, the Department uses the flexibility allowed by EPA to encourage the use of innovative, less costly, and more efficient methods of reducing lead-based paint hazards. To encourage property owners to perform those lead hazard reduction activities that last the longest, the Department proposes variable certificate expiration dates that reward activities such as window replacement. Ideally, no property would have deteriorated lead-based paint or lead-based paint on friction or impact surfaces.

The Milwaukee ordinance, however, might appear to be in conflict with window standards proposed in this rule. The Milwaukee ordinance requires that all *deteriorated components* of a double hung window, except for exterior casings and the exterior sill, have paint removed to bare wood, or be enclosed or replaced. The ordinance does not state a lead hazard reduction requirement if a window has been maintained in good condition. The Department’s rule allows lead-based paint to remain on a window if all of the following apply:

- The paint is not deteriorated;
- The substrate is sound;
- Dust-lead hazards are not present;

- The window trough is smooth and cleanable;
- Accumulated paint is not present in areas where it might be crushed to create dust-lead or debris;
- The window functions properly, glazing does not have gaps, and operable storm windows are present and installed unless windows are double-paned or the windows were not designed to have storm windows.

If lead-based paint is not present on a window, however, the property might qualify for a longer certificate.

Finally, the Milwaukee ordinance authorizes the Milwaukee Health Department to provide lead-safe maintenance training, but does not require property owners to be trained. The Department's proposed rule requires persons be certified in order to perform work that disturbs lead-based paint on registered lead-safe property, and provides several levels of certification. HUD requires lead-safe maintenance training for work in Section 8 housing.

New Federal Regulations

The U.S. Department of Housing and Urban Development (HUD) revised 24 CFR Part 35 effective September 15, 2000. The regulations require most properties owned by the federal government or receiving federal assistance to conduct specified activities to reduce lead hazards. The HUD regulations most directly affect property owners receiving federal rehabilitation funds and landlords whose tenants receive federal rental assistance.

To comply with HUD's requirements, most properties receiving federal funds for renovation or rehabilitation must have a risk assessment completed and certified persons must be used to reduce or eliminate the lead-based paint hazards identified in the risk assessment report. Property owners receiving funds for rental assistance or renovation must also use trained people to perform maintenance or renovation activities and must have a clearance visual inspection and dust-lead sampling conducted after completing activities that disturb lead-based paint. In some cases, the regulations also require annual re-evaluation of the property by a certified lead risk assessor.

The Department has worked with HUD to enable the Department to accredit HUD-approved lead-safe maintenance courses with only slight modification from the basic HUD requirements. The Department has also submitted a request to HUD for approval of Department-accredited lead low-risk work courses as allowable training for performing lead-safe maintenance and renovation under HUD regulations; approval is anticipated.

On June 3, 1998, EPA proposed standards for identifying lead-based paint hazards under the authority of SECTION 403 of the federal Toxic Substance Control Act. Final regulations implementing Section 403 took effect on March 6, 2001. Unlike previous federal lead-based paint legislation that focused only on the presence of lead-based paint, this legislation switches the focus of Federal lead-poisoning prevention efforts away from the removal of lead-based paint and toward management of lead-based paint hazards.

The EPA standards will play an important role in the national lead-based paint program. For example, the standards will be used by risk assessors to determine if lead-based paint hazards exist in pre-1978 housing and child-occupied facilities (e.g., daycare centers). Property owners will use the standards to identify conditions that must be disclosed before leasing or selling target housing under regulations of HUD and EPA. In addition, these regulations will provide advice to the public about conditions that present health risks to young children that should be addressed. EPA-authorized lead training and certification programs, including the program administered by the

Department, must incorporate the standards into State rules as a minimum standard no later than February 5, 2003. The standards may also be incorporated into local laws and regulations, housing codes, and lending and insurance underwriting standards.

EPA is also preparing to promulgate lead training and certification requirements under 40 CFR Part 745 for persons performing renovation and remodeling regulations. Under these regulations, any person who disturbs paint in a pre-1978 dwelling, other than a homeowner performing activities in an owner-occupied dwelling, will have to complete lead-safe training. EPA is also considering requiring a visual inspection and dust sampling for clearance after any activity that disturbs paint in a pre-1978 dwelling, except when work on owner-occupied property was done by the property owner.

The Department's authority to repeal and recreate these rules is found in ss. 227.24 (1), 250.04 (7), 250.041, 254.115, 254.15, 254.167, 254.172, 254.176 (1) and (3), 254.178 (2), and 254.179, Stats. The rules interpret ss. 254.167, 254.171, 254.172, 254.173, 254.176, 254.178, 254.179, 254.18 and 284.181, Stats.

SECTION 1. Chapter HFS 163 is repealed and recreated to read:

Chapter HFS 163

CERTIFICATION FOR THE IDENTIFICATION, REMOVAL AND REDUCTION OF LEAD-BASED PAINT HAZARDS

Subchapter I – General Provisions

- HFS 163.01 Authority and purpose.
- HFS 163.02 Scope.
- HFS 163.03 Definitions.

Subchapter II – Certification of Persons to Perform Lead Hazard Reduction Activities or Lead Investigation Activities

- HFS 163.10 Certification of an individual.
- HFS 163.11 Certification training requirements.
- HFS 163.12 Certification of a lead company.
- HFS 163.13 Responsibilities of certified persons.
- HFS 163.14 Work practice standards.
- HFS 163.15 Lead-based paint hazard standards.

Subchapter III – Accreditation of Lead Training Courses and Approval of Training Managers and Instructors

- HFS 163.20 Accreditation requirements.
- HFS 163.21 Application for accreditation.
- HFS 163.22 Accreditation procedures.
- HFS 163.23 Renewal of course accreditation.
- HFS 163.24 Training manager and instructor approval.

HFS 163.25 Administrative responsibilities of training managers.

Subchapter IV – Enforcement

HFS 163.30 General provisions.
HFS 163.31 Reasons for enforcement actions.
HFS 163.32 Enforcement actions.
HFS 163.33 Appeal.

Subchapter V – Registry of Property with Certificates of Lead-Free Status or Lead-Safe Status

HFS 163.40 General provisions.
HFS 163.41 Certificate of lead-free status.
HFS 163.42 Certificate of lead-safe status.
HFS 163.43 Certification of property owners and employees
HFS 163.44 Work practice standards for lead-based paint activities on registered lead-safe property.

Appendices

Subchapter I - General Provisions

HFS 163.01 Authority and purpose. (1) GENERAL. This chapter is promulgated under the authority of ss. 250.04 (7), 250.041, 254.115, 254.15, 254.167, 254.172, 254.176 (1) and (3), 254.178 (2) and 254.179, Stats.

(2) ACTIVITIES INVOLVING TARGET HOUSING AND CHILD-OCCUPIED FACILITIES. This chapter is intended to ensure that persons who perform lead hazard reduction activities or lead investigation activities do so safely to prevent exposure of building occupants to hazardous levels of lead. This is accomplished by requiring an individual to be trained and certified under s. HFS 163.10 before the individual performs, supervises or offers to perform or supervise specified lead hazard reduction or lead investigation activities involving target housing or a child-occupied facility or the real property on which the target housing or child-occupied facility stands. In addition, the certified individual is required to be associated with a lead company certified by the department under s. HFS 163.12. Subchapter II of this chapter also requires that a training course that is represented as qualifying any person for certification to perform lead abatement or lead investigation activities be accredited by the department before the training course is offered, advertised or conducted and that training managers and principal instructors be separately approved by the department. Subchapter II further provides for the accreditation of lead-safe maintenance courses.

(3) ACTIVITIES INVOLVING REGISTERED LEAD-FREE PROPERTY AND REGISTERED LEAD-SAFE PROPERTY. In addition to requirements under sub. (2), and subject to exceptions under s. HFS 163.43, a person who disturbs lead-based paint on registered lead-safe property shall successfully meet the requirements of this chapter and have documentation of certification issued by the department before performing, supervising or offering to perform or supervise a high-risk or low-risk lead-based paint activity on registered lead-safe property. In addition, this chapter establishes standards for registered lead-free and registered lead-safe property that encourage long-term lead hazard reduction, procedures for determining whether a property meets the standards, and procedures for issuing and maintaining certificates of lead-free status and lead-safe status.