



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Treatment of Lead-Based Paint Abatement Work as a Supplemental Environmental Project in Administrative Settlements

FROM: Ann Pontius, Director *Ann Pontius*
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TO: Regional Counsel
Regional Toxics and Pesticides Division Directors
Regional Enforcement Coordinators
Regional SEP Coordinators

The purpose of this memorandum is to identify when it is appropriate to include lead-based paint abatement work (lead abatement work) as a Supplemental Environmental Project (SEP) in EPA's administrative settlements for violations of the Residential Lead-Based Paint Hazard Reduction Act (Lead Hazard Reduction Act) and its implementing regulation, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property (Disclosure Rule). The Lead Hazard Reduction Act authorizes civil enforcement in both the administrative and judicial forums. While EPA and the Department of Housing and Urban Development (HUD) have administrative penalty authority, the Lead Hazard Reduction Act also provides EPA and HUD with the ability to seek injunctive relief judicially through litigation brought by the Department of Justice (DOJ). Because the federal government has the ability to address violations in both the administrative and judicial forums, it is important to clarify the factors that should be considered when determining whether the government should seek lead abatement work as injunctive relief.

In the civil judicial forum, EPA, HUD, and DOJ have united in an interagency lead-based paint enforcement initiative which, in addition to ensuring prospective compliance with all disclosure and record keeping obligations, also seeks meaningful injunctive relief to redress past violations and payment of a civil penalty. To date, as part of this initiative, DOJ, on behalf of EPA and HUD, has successfully obtained commitments from defendants to address lead-based paint hazards in over 27,000 apartment units. The scope of this injunctive relief includes requiring defendants to take appropriate measures to abate lead-based paint hazards in units

where those hazards pose a threat to human health. These judicial cases are an important component in our strategy to ensure compliance with the law and reduce lead-based paint hazards.

EPA and HUD have been equally successful in obtaining abatement of lead-based paint and lead-based paint hazards through SEPs and other mechanisms in negotiated settlements in the administrative forum, and also securing civil penalties and ensuring prospective compliance with the Disclosure Rule. In fiscal year 2003, EPA Regions successfully obtained lead abatement work in at least nine settlements and facilitated lead-based paint free certifications in an additional three settlements. In January 2002, EPA Headquarters and HUD used the administrative forum to enter into the broadest lead disclosure settlement to date with one of the nation's largest property management firms, the Denver-based Apartment Investment and Management Company (AIMCO). The AIMCO Consent Agreement and Final Offer (CAFO) required AIMCO to perform lead hazard inspections and lead abatement work in more than 130,000 apartment units. We encourage the Regions to continue administrative enforcement of the Disclosure Rule, which should include negotiation with owners and managers of target housing units to obtain abatement of lead-based paint and/or lead-based paint hazards to ensure that we achieve the most beneficial compliance and human health result.

As discussed above, the Lead Hazard Reduction Act provides EPA and HUD with authority to assess administrative penalties and to judicially seek injunctive relief through litigation brought by DOJ. Since the Act does not authorize EPA to seek injunctive relief administratively, lead abatement work conducted pursuant to an administrative settlement agreement may properly be considered a SEP provided that the Region determines, based upon readily available information, that it is unlikely that the government could obtain abatement work as injunctive relief under the facts of the particular case. In those cases where factors indicate that injunctive relief may be appropriate, DOJ should be consulted and, if appropriate, the case should be referred.

When a Region has evidence regarding the units at which the Disclosure Rule violations have occurred, the Region should consider the following factors to determine whether the case is appropriate for injunctive relief:

- whether tenants/occupants who did not receive disclosure upon moving in to their units are still present in those units;
- the seriousness of the harm posed by the violations, including: whether the unit(s) contains lead-based paint, whether conditions in the unit(s) constitute a lead hazard, the seriousness of such lead hazards, and information about the occupants of the affected unit(s), such as the presence of any elevated blood lead levels in children;
- the size of the violator relative to the community in question, e.g., a property owner may be small compared to owners in other metropolitan areas but large with regard to where it owns property; and

the extent of the non-disclosure, i.e., the number of units involved and the nature and number of violations per unit.

Of course, these factors are guidelines designed to assist the Regions and do not prohibit the Regions from referring cases to DOJ. We recommend, however, that the Regions confer with DOJ on those cases where evaluation of the factors may lead to a determination that a case is appropriate for judicial resolution.

Depending upon case specific factors and enforcement resources, a Region may not have complete information regarding the above factors. However, if, based upon readily available information, the Region determines that it is unlikely that the government could obtain abatement work as injunctive relief under the facts of the particular case, the Region may proceed administratively, obtaining lead abatement work through a SEP.

The guidance set forth in this memorandum is intended solely for the guidance of government personnel. It does not intend to create, nor can it be relied upon to create, substantive or procedural rights, enforceable by any party in litigation with the United States.

If you have any questions regarding this memorandum, please contact Ilana Saltzbart of my staff at (202) 564-9935.

cc: Regional Lead Managers