

# ALLIANCE FOR HEALTHY HOMES

*Working for Affordable Healthy Housing for All*



August 26, 2009

Dear Lead Poisoning Prevention Advocates:

I wanted to offer a few more thoughts on the settlement announced this morning between the public interest organizations and the EPA over the RRP rule.

Firstly, I would like to extend my most sincere gratitude to the public interest petitioners who sued the EPA, and especially to Tom Neltner and Matthew Chachere who served as co-counsel for the petitioners. They have worked tirelessly without funding to move this forward.

The settlement offers several major gains for lead poisoning prevention advocates. It eliminates the owner-occupied opt-out, which not only altered the Congressional definition of "target housing" but also posed continued risks to future occupants and neighbors, not to mention gave contractors an excuse to get out of the habit of working safely and poison themselves and their families. The settlement also requires additional disclosures to the owner and occupant of the property, ensuring that tenants will receive information rapidly, and without dependence on the landlord, about what was done (or not done) in their unit. Down the road, the settlement will require use of lead safe work practices in public and commercial buildings, which was also required under Title X, and will address problems many communities lack adequate regulation on.

From the get go, one of the most controversial aspects of the RRP rule has been the issue of clearance testing.

As we wrote when the rule first came out, the lack of clearance, and the substitution of it with cleaning verification was ignoring substantial science demonstrating the validity of clearance. The Alliance believed then and believes now that clearance testing has an essential role to play in ensuring renovation work is done safely.

Today's settlement does not give us all we would have wanted in terms of clearance. But it does move us much closer to the goal.

Next year, the EPA will be required to propose adding to the rule that renovators will have to perform dust testing after certain "dusty" jobs, and in a select few circumstances meet full clearance testing. This addition to the rule will at last ground federal RRP in the concept of quantitative dust testing. Renovators will have to become aware of testing; demand will help stimulate a market for post-work dust sampling and lab sample analysis. It will also ensure that those who potentially created the hazards are required to provide real information about lead levels to property owners and occupants who can then make decisions to protect their families.

Unfortunately, when EPA requires dust testing as mentioned above, they may not necessarily require compliance with the dust standards. In other words, a renovator will be required to have a dust sample collected and analyzed. They will not, however, be required to take any action beyond disclosing the result to the owner and occupant (excepting those few jobs that require actual “clearance.”) The public interest petitioners pushed hard for wider clearance requirements - this is truly as far as they could get EPA to go.

Obviously this raises some serious questions and concerns, and creates some very difficult situations where folks could be informed there is a lead hazard present in their building without good solutions to correct it. A homeowner whose contract didn't require clearance could be stuck footing the bill for clean-up (if they can afford it) when the renovator doesn't pass the dust tests. We also know that renters are in many ways the most vulnerable to lead. This scenario is particularly difficult for a tenant whose landlord provided a repair, ends up documenting a hazard, and then refuses to correct it. Under the RRP rule, the tenant would have no legal recourse, although they have other (possibly complicated) federal legal options under RCRA and likely a number of local legal options.

However, compared to what we currently have, this settlement is a big step forward.

First and foremost, it makes it a lot easier for states that decide to take on the RRP program to do the right thing and require actual clearance testing. Making the jump from EPA's cleaning verification to actually requiring clearance would be a big political risk in many states. However, the jump from required testing to requiring contractors to pass the test is a much less risky jump for states to make. In fact, in several states and local jurisdictions, the presence of a lead hazard is already illegal. Responsible enforcement of these laws would require property owners (if not the renovator) to correct the hazard identified by the testing that EPA would be mandating. Even in localities without such laws, the proof of a hazard as documented by the tests may make the housing uninhabitable or otherwise provide basis for tenants to demand corrections from landlords.

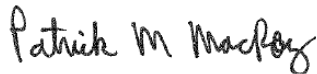
Secondly, failing a dust test creates enough problems for renovators that they would be wise to make sure they pass the test or re-clean until the standard is met. The potential liability, especially if the renovator doesn't have pre-renovation samples proving the area was already contaminated, is substantial. Any risk-averse professional would not want the liability hanging over them. Additionally, most contractors - even the less professional ones - depend upon word of mouth for a substantial percentage of their work. It's hard to imagine contractors getting a lot of referrals or repeat business if they leave a big mess (literal and metaphorical in terms of the legal questions) behind for the owner, tenant, or landlord to deal with.

Thirdly, it provides some scientifically derived information for owners and tenants to work with. Information is power. Even if the law does not mandate the contractor to immediately correct the hazard, knowledge that there is actually a hazard will at least

allow the owner or tenant to take some additional action. Under the current regime there would be no information upon which to discover additional action was necessary. The test results from the sampling are also disclosable - both by the contractor to the owner and occupant after the job and to subsequent owners and tenants in accordance with 1018. Having to tell future residents about the problem is motivation for the owner to ensure they are addressed.

This is a step forward and it is as much as could be expected from the legal avenues. However, there is more to do. I hope you will join the Alliance in advocating for additional protections. When the EPA proposes the dust testing requirements, they need to hear from all of us in the lead poisoning prevention community that letting contractors walk away from a hazard is bad policy. We must demand real clearance, and we must use some of the time between then and now to work on gathering the evidence to support this. As immediately, we need to work at the state and local level to ensure states go the extra distance. The settlement makes it easier for states to do the right thing, but not foolproof. Now is the time to work with fellow advocates, including public agency folk and legislators, to ensure that your state includes a requirement that when dust samples fail, someone is on the hook to solve the problem.

Thank you, as always, for your dedication to eliminating lead poisoning!



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