

ALERT

EPA Issues New Dust-Lead Hazard Standards

June 24, 2019

Friday's Action

On Friday, June 21, 2019, the U.S. Environmental Protection Agency (EPA) issued new dust-lead hazard standards that could have major impacts on the construction, paint and coatings, and U.S. recycling industries. These standards apply to most pre-1978 housing and child-occupied facilities.

Specifically, these new standards reduce maximum dust-lead hazard levels from 40 $\mu\text{g}/\text{ft}^2$ and 250 $\mu\text{g}/\text{ft}^2$ to 10 $\mu\text{g}/\text{ft}^2$ and 100 $\mu\text{g}/\text{ft}^2$ on floors and window sills, respectively. EPA did not change the definition of lead-based paint in this final rule because the agency lacked sufficient information to support such a change. The final rule also did not address clearance levels. EPA stated that it has initiated action on the clearance levels under a separate rulemaking, as noted in the Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions.

We expect to see legal challenges filed against EPA over this final rule. We also expect EPA to begin regulatory actions to conform to these new dust-lead hazard standards.

Background

In 2009, several environmental and public health advocacy groups filed an administrative petition with EPA to lower the dust-lead hazard standards from 40 $\mu\text{g}/\text{ft}^2$ and 250 $\mu\text{g}/\text{ft}^2$ to 10 $\mu\text{g}/\text{ft}^2$ and 100 $\mu\text{g}/\text{ft}^2$ on floors and window sills, respectively, and to lower the definition of lead-based paint. EPA responded to this petition by agreeing to commence an appropriate proceeding, but the agency explicitly stated it would not commit to a schedule or outcome. In response to

Authors

David B. Weinberg
Senior Counsel
202.719.7102
dweinberg@wiley.law

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agency inaction, in 2016, the administrative petitioners filed a petition for writ of mandamus with the U.S. Court of Appeals for the Ninth Circuit seeking a court order (1) to find that EPA unreasonably delayed promulgating the requested rulemaking and (2) to compel the agency to issue a proposed rule within 90 days of a decision. On December 27, 2017, a panel majority of the Ninth Circuit ordered EPA to issue a proposed rule by a date certain and a final rule within one year of proposal. Pursuant to the court order, EPA issued its proposal on June 22, 2018, thus making this past Saturday, June 22, 2019, the deadline to finalize the dust-lead hazards and definition of lead paint rulemaking.

Initial Observations

We have three initial observations to share with clients.

First, EPA exercised its discretion to set the hazard standards at 10 $\mu\text{g}/\text{ft}^2$ and 100 $\mu\text{g}/\text{ft}^2$ on floors and window sills, respectively, based on considerations of the potential for risk reduction and whether such actions are achievable. It also considered the effectiveness of existing programs aimed at achieving such reductions. EPA also stated that practicability is an important component of achievability because, as standards decrease, an increasing amount of target housing will be challenged to achieve dust-lead levels below those standards. Importantly, in its achievability analysis, EPA also analyzed whether laboratories recognized by EPA's National Lead Laboratory Accreditation Program (NLLAP) could reliably detect the lower dust-lead loadings in its final rule. EPA concluded most, if not all, of the NLLAP-recognized laboratories will be able to perform reliable testing based on the new standards.

Nevertheless, we have reviewed the comments that EPA received on its proposal and anticipate some entities will likely challenge EPA's determination on what hazard standards are achievable, citing new studies that demonstrate the achievability of 5 $\mu\text{g}/\text{ft}^2$ on floors and 40 $\mu\text{g}/\text{ft}^2$ on window sills.

Second, EPA did not make any changes to the post-abatement clearance levels in 40 C.F.R. § 745, subpart L. These levels require a certified inspector or risk assessor to sample an abated area for dust-lead loadings and determine whether the sample meets the applicable clearance level. The agency, however, specifically affirmed that it has initiated action to address the clearance levels. Until EPA makes any corresponding changes, there will be a disparity between the dust-lead hazard standards and the current clearance levels (40 $\mu\text{g}/\text{ft}^2$ for floors and 250 $\mu\text{g}/\text{ft}^2$ for window sills). For example, target housing and covered facilities may satisfy the lead abatement requirements while still not achieving lead levels consistent with the new dust-lead hazard standards. We believe EPA will amend the current clearance levels to make them consistent with the dust-lead hazard standards because the agency concluded that laboratories can reliably and accurately detect lead at those levels.

Third, now that EPA has addressed children's exposure in homes and child-occupied facilities with lead-based paint hazards, except for the clearance standard, we anticipate the agency will turn its attention to reducing lead exposure from drinking water. Specifically, we believe EPA will likely issue its revisions to the National

Primary Drinking Water Regulations for Lead and Copper (LCR), which have not received a significant update since 1991, later this summer and as early as July. EPA sent its LCR proposal out for interagency review earlier this month. We understand that the proposal will identify the highest-risk lead pipes and initially focus EPA's work on the most-impacted areas of the country.