June 19, 2020

DEPARTMENT OF THE ENVIRONMENT
LAND AND MATERIALS ADMINISTRATION

Response to Comments

On the Proposed Action to
Repeal Existing and Adopt New Regulations under COMAR 26.02.01
Amend Regulations under COMAR 26.02.07, 26.16.01, 26.16.02, and 26.16.05, and
Adopt New Regulations under COMAR 26.16.08

Introduction: On April 24, 2020, the Maryland Department of the Environment ("MDE" or the "Department") proposed to amend certain regulations regarding lead abatement and lead poisoning prevention. The public comment period on the proposed action ended on May 26, 2020, and no hearing was held on the proposed regulations. MDE received two comments on the proposed action. Responses to the comments are provided in this document. After reviewing the public comments, the Secretary of the Environment adopted the regulations as proposed. A Notice of Final Action was published in the June 19, 2020 issue of the *Maryland Register*.

The regulatory changes consist of the following actions:

1. Repealed existing Regulations .01—.05 and adopted new Regulations .01—.05 under COMAR 26.02.01 Blood Lead Reporting;
2. Adopted amendments to Regulations .02 and .12 under COMAR 26.02.07 Procedures for Abating Lead Containing Substances from Buildings;
3. Adopted amendments to Regulation .02 under COMAR 26.16.01 Accreditation and Training for Lead Paint Abatement Services;
4. Adopted amendments to Regulations .02, .02-1, and .05 under COMAR 26.16.02 Reduction of Lead Risk in Housing;
5. Adopted amendments to Regulations .01—.03, .10, and .12 under COMAR 26.16.05 Procedures for Performing Lead Paint Abatement Services; and
6. Adopted new Regulations .01—.08 under a new chapter, COMAR 26.16.08 Environmental Investigations.

The regulatory changes establish procedures for conducting an environmental investigation when a child under the age of 6 or a pregnant woman is diagnosed with elevated blood lead (EBL), as well as update MDE's regulations governing blood lead reporting by laboratories and health care providers. These regulatory changes were necessary to comply with a 2019 legislation (Chapter 341) that, among other things, lowered the blood lead level that constitutes EBL to the U.S. Centers for Disease Control and Prevention (CDC) blood lead reference level of 5 micrograms per deciliter (the "reference level"), as well as required MDE to adopt environmental investigation regulations that are consistent with, or more stringent than, the U.S. Department of Housing and Urban Development's (HUD) *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing* (the "*HUD Guidelines*").[1]

The regulatory changes also establish more stringent dust-lead level standards of less than 10, 100, and 100 micrograms per square foot for floors, window sills, and window wells, respectively, for the purpose of post-abatement clearance testing and satisfying the risk reduction standards under the Maryland Reduction of Lead Risk in Housing Act.[2] These State standards were revised in order to be consistent with the recently lowered federal dust-lead hazard standards in 40 CFR Part 745 used to identify a dust-lead hazard during a

[1] Chapter 341, Acts of 2019. A copy of the 2019 legislation is available at http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/hb1233/?ys=2019rs.
[2] Environment Article, §§6-815 and 6-819, Annotated Code of Maryland.

risk assessment, which are greater than or equal to 10 or 100 micrograms per square foot for floors and interior window sills, respectively.[3] Lastly, the regulatory changes clarify laboratory analysis requirements for environmental lead samples, incorporate by reference new or updated chapters of the *HUD Guidelines* and technical standards for lead-based paint activities in the regulations, and make necessary updating and clarifying revisions to the regulations.

Comments and Responses: MDE received written comments from the Green and Healthy Homes Initiative (GHHI) and Aerosol Monitoring & Analysis, Inc.

A summary and excerpts of the comments are provided below, along with MDE's response.

1. **COMMENT - Support for Revised Lead Regulations:**
   The commenters expressed their overall support for the regulations. One commenter noted that: the revised blood lead reporting requirements enhance both the sharing of childhood blood lead surveillance information among Maryland's lead poisoning prevention partners and the State and local governments' intervention in confirmed cases; the incorporation of the CDC's reference level and the environmental investigation procedures of the *HUD Guidelines* make MDE's regulations consistent with CDC guidance, current science, and best practices for reducing childhood lead exposure, as well as support State and local governments' ability to identify and manage confirmed cases of EBL in children; and the lowered dust-lead level standards are reflective of scientific research and are more closely aligned with the U.S. Environmental Protection Agency's (EPA) health-based standards for lead in housing.

   RESPONSE:
   MDE thanks the commenters for their support.

2. **COMMENT - Environmental Investigation Protocol, Paint Survey Analysis in Post-1977 Properties:**
   "[COMAR 26.16.08.06E(2)(c)] of the proposed regulations should be removed for a number of reasons, including but not limited to, the following…[when] there is an Elevated Blood Lead Level [(EBL Level)] child investigation it is important to consider all potential sources of lead exposure including soil, water, other property visitation, painted furniture, toys, cosmetics, jewelry etc. in accordance with HUD Guidelines, Chapter 16. However, if the housing unit is constructed after 1977, it is presumed by the [federal and State] lead regulations and industry standards to be free of [lead-based paint (LBP)].

   Requiring a paint survey in post-1977 housing units as part of the MDE Environmental Investigation Protocol also may unfairly draw the building owner into legal proceedings that require the owner to absorb unnecessary expenses to conduct a HUD Chapter 7 LBP inspection."

   RESPONSE:
   Proposed COMAR 26.16.08.06E(2)(c) requires an MDE or local health department lead paint risk assessor to perform a paint survey analysis on certain surfaces during an environmental investigation of a property built after 1977. Those surfaces include any interior or exterior painted surface that has: deteriorated paint; intact paint and the surface is subject to friction or impact; or been identified as a potential lead hazard through the environmental questionnaire, painting history of the property, or by the lead paint risk assessor. COMAR 26.16.08.06E(2)(c) is consistent with Chapter 16 of the *HUD Guidelines*, which provides a method for investigating the possible causes of lead poisoning for a child under the age of 6. Chapter 16 requires that environmental testing performed during an investigation

[3] 40 CFR §§745.65(b) and 745.227(h)(3); and 84 Fed. Reg. 32632–32648 (2019). A copy of the final rule adopting the federal DLHS is available at https://www.federalregister.gov/documents/2019/07/09/2019-14024/review-of-the-dust-lead-hazard-standards-and-the-definition-of-lead-based-paint.

should include, at a minimum, x-ray fluorescence or laboratory paint chip analysis of painted surfaces that are not intact/deteriorated or subject to impact or friction.[4]

Chapter 341 added §6-305 to the Environment Article, which requires MDE to adopt regulations for conducting an environmental investigation to determine lead hazards for a child under the age of 6 or a pregnant woman with EBL greater than or equal to the reference level. Those regulations are required to be consistent with, or more stringent than, the *HUD Guidelines*. Section 6-305 contains no limitation based on the construction year of a residential property subject to an environmental investigation. Therefore, the Department's environmental investigation regulations must be consistent with, or more stringent than, the *HUD Guidelines* with respect to all residential properties being investigated, not just those built prior to 1978. Additionally, the full painting history of a property may be unknown to a property owner. Although the federal ban on "lead-containing paint" for residential and consumer use went into effect in 1978, there may be post-1977 residential properties painted with lead-based paint purchased before the ban went into effect.[5]

MDE does not agree that the requirement for a lead paint risk assessor to perform a paint survey analysis on surfaces with deteriorated paint or subject to impact or friction at post-1977 properties will require owners of post-1977 residential properties to conduct lead-based paint inspections. MDE or a local health department is mandated, as part of case management, to perform environmental investigations for confirmed cases of EBL in a child under the age of 6 or a pregnant woman.[6] Therefore, an MDE- or local health department-employed lead paint risk assessor will perform the paint survey analysis and provide the results of the analysis to the post-1977 residential property owner as a part of the environmental investigation report.[7]

3. COMMENT – Environmental Investigation Protocol, Lowering the Tap Water Sampling Action Level to 5 parts per billion (ppb):

"Lead is a toxic substance that can accumulate in the body over time and drinking water alone can compose 20% or more of a person's cumulative exposure. Especially, for pregnant women, young mothers who are breast feeding, and other parents or caregivers who may use tap water to prepare infant formulas and family meals – a family's consumption of water is a daily routine. Children under the age of six who are exposed to elevated lead concentrations in water are more susceptible to the harmful impacts of lead exposure because their bodies and brains are developing. The science is clear. If testing of the water confirms that the lead levels in water exceed the allowable standards, then we must act and provide the families with applicable notice for remediation. It is morally imperative to protect children from the toxic effects of lead exposure at lower levels. Therefore, GHHI recommends the Department follow other states who have moved from the antiquated 15 ppb action level for lead in water to below HUD's Chapter 16 guidelines. By adopting this safer standard for lead in water action level in residential homes, the Department can identify the source of lead exposure and require remediation at 5 [ppb] or above where that lead concentration in drinking water exists. This puts forth the best approach for reducing lead exposure to our children in Maryland."

RESPONSE:

The federal Lead and Copper Rule (the "LCR") establishes the national primary drinking water regulations for lead, as well as a treatment technique to reduce corrosion of lead within a public water system.[8] Under the LCR, the lead action level is exceeded if the concentration of lead in a 1 liter (L),

[4] HUD Office of Lead Hazard Control and Healthy Homes. *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing*. Second Edition, July, 2012. pp. 16-8, 16-10 and 16-11 (https://www.hud.gov/sites/documents/LBPH-18.PDF).

[5] 16 CFR §§1303.1 et seq.

[6] Environment Article, §§6-304 and 6-305, Annotated Code of Maryland.

[7] COMAR 26.16.08.08.

[8] 40 CFR §§141.80—141.91.

first-draw sample in more than 10 percent of tap water samples tested by a public water system is greater than 15 ppb (i.e., if the "90th percentile" lead level is greater than 15 ppb).[9] The *HUD Guidelines* uses 15 ppb in a 1L, first-draw tap sample as a standard for lead hazard identification, consistent with the federal LCR.[10] The samples must be collected from taps at residential properties that are considered high risk (i.e., "tier 1 sampling sites") due to the presence of lead in the plumbing (e.g., lead service lines, lead pipes, lead solder, etc.). The 15 ppb action level is not a health-based standard, rather, it is a level at which a public water system must take action to reduce lead at the tap, including the performance of corrosion control treatment, lead service line replacement and public education. The LCR also establishes a Maximum Contaminant Level Goal of zero for lead, in recognition that there is no safe level of lead exposure.[11] It should be noted that the LCR establishes a "practical quantitative level" of 5 ppb for lead.[12] Five ppb acts as the method detection limit for analyzing lead in drinking water for many State-certified water quality laboratories in Maryland, and any level below 5 ppb is considered not detected.

The LCR is incorporated by reference into the State primary drinking water regulations at COMAR 26.04.01.01-1B(7); therefore, the lead action level in Maryland is a concentration of lead which exceeds 15 ppb in a 1L, first-draw sample based on the 90th percentile lead level of tap water samples. The commenter recommends lowering the State's lead action level to 5 ppb; however, MDE is prohibited under State law from adopting a lead action level of 5 ppb in regulation. Section 9-407 of the Environment Article authorizes MDE to adopt and enforce State primary drinking water regulations, but it states that "[the] State primary drinking water regulations may not be more stringent than the complete interim or revised national primary drinking water regulations in effect at the time".[13] Furthermore, the revisions to the LCR proposed by EPA on November 13, 2019 would retain the current 15 ppb lead action level.[14] Consequently, §9-407 of the Environment Article does not authorize MDE to adopt a lead action level more stringent than the lead action level in the current and proposed revision of the federal LCR. In addition, since 5 ppb serves as the method detection limit for laboratory analysis of lead concentrations in water, establishing a lead action level of 5 ppb would mean that samples with lead concentrations less than 5 ppb would be reported as "not detected" instead of a numerical value.

[9] 40 CFR §§141.80(c) and 141.86(b).
[10] HUD Office of Lead Hazard Control and Healthy Homes. *Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing.* Second Edition, July, 2012. pp. 16-13 and 16-14. (https://www.hud.gov/sites/documents/LBPH-18.PDF).
[11] 40 CFR §141.51.
[12] 40 CFR §141.89(a)(1)(ii)(A).
[13] Environment Article, §9-407(b)(1), Annotated Code of Maryland.
[14] 84 Fed. Reg. 61684–61774 (2019). The proposed revisions to the LCR would also establish a 10 ppb trigger level that upon exceedance would require a public water system to protectively perform additional planning, monitoring, and treatment activities (pp. 61687 and 61688). A copy of the proposed rule is available at https://www.federalregister.gov/documents/2019/11/13/2019-22705/national-primary-drinking-water-regulations-proposed-lead-and-copper-rule-revisions.