

Report From Agency

DEPARTMENT OF HEALTH SERVICES
Office of Legal Counsel
F-02113 (08/2017)

STATE OF WISCONSIN
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RULEMAKING REPORT TO LEGISLATURE

CLEARINGHOUSE RULE CR 19-110

Ch. DHS 163

Basis and Purpose of Proposed Rule

The Department of Health Services (“The Department”) is required to administer a comprehensive statewide lead poisoning prevention program that includes certification, accreditation and approval requirements. Requirements for lead certification, training course accreditation and instructor approval are established in Ch. DHS 163. The Department proposes to make the following revisions to the rule chapter:

1. Lead inspection is defined in Ch. DHS 163 and work practice standards are provided. The Department proposes to revise the rule to reflect language in 2015 Wisconsin Act 122 that exempts certain partial lead inspection activities from meeting lead inspection requirements under Ch. DHS 163.
2. Lead-bearing paint is defined in current rule to comply with the U.S. Consumer Product Safety Commission’s definition as set in 1978. 2015 Wisconsin Act 55, Section 4045p, amended the statutory definition of lead-bearing paint in § 254.11 (8). The Department proposes to amend the definition of “lead-based paint or lead-bearing paint” to comply with the statutory definition in Wis. Stat., Ch. 254.
3. In 2011, the U.S. Environmental Protection Agency (EPA) revised its Lead-Based Paint Poisoning Prevention in Certain Residential Structures regulation under 40 CFR Part 745 to require states authorized by EPA to administer a lead-based paint program in lieu of the EPA to meet a minimum standard for flexible remedies that includes the authority to assess civil penalties, including a maximum penalty authority for any violation in an amount no less than \$5,000 per violation per day. At the time, the maximum penalty authority for lead-based paint violations in Wisconsin statute and rule was \$1,000 per violation per day. 2015 Wisconsin Act 55, Section 4049d, increased the civil penalty authority for violations of lead paint regulations from up to \$1,000 per violation per day to up to \$5,000 per violation per day in compliance with the federal requirements. The Department proposes to amend the current maximum penalty in rule from \$1,000 to \$5,000 per violation per day in compliance with Wis. Stat., Ch. 254.
4. The current rule required the Department to process certification applications within 10 days of receipt. With the addition in 2010 of certification requirements for lead-safe renovation to the rule, certification workload has tripled with no additional staff position provided, making it difficult and at times impossible to routinely meet the 10 day requirement. A review of other Midwest states showed that no other state has such a self-limiting expectation. The Department proposes to revise the number of days it has to process certification applications from 10 days to 15 days.
5. The current asbestos rule, Ch. DHS 159, provides for provisional certification for applicants to be able to work using their training completion diploma until they receive their certification card. This allows a person to be able to work immediately once they have submitted their application. Provisional certification would effectively offset any harm potentially created by extending the Department’s certification processing time in item #4 from 10 to 15 days. The Department proposes to add provisional certification to Ch. DHS 163, similar to Ch. DHS 159.

6. Current certification language in Ch. DHS 163 is unnecessarily complicated and difficult to understand, even for employees charged with administering it. For instance, lead disciplines that require an initial state exam may only be for 1 year initially, but thereafter may be renewed for either 1 or 2 year lengths depending on the refresher training cycle, while others are only offered with a 2-year option. To help simplify and standardize the certification options for everyone, the Department proposes to eliminate all 1-year certifications and make all certifications good for 2 years, reducing the frequency of re-certifications.

7. Since Ch. DHS 163 was last amended, significant changes in work practice guidelines have been published. Specifically, the U.S. Department of Housing and Urban Development (HUD) published a significantly revised new edition of its HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing in 2012. These guidelines are the most definitive documented source for work practices for lead hazard reduction and lead investigation professionals. The Department proposes updating the work practice standards language and requirements for lead abatement, lead-safe renovation, and lead investigation activities to be in compliance with the revisions to the HUD Guidelines. This may include adding or updating some definitions, as well.

8. Under the lead rule, companies may apply for course accreditation to offer lead courses in the various disciplines leading to certification. Once accredited the course must continue to meet the requirements for an accredited course, including meeting a student to instructor ratio of not less than 8:1 for all student hands-on practice requirements, ranging from 2 to 6 hours for 1- to 2-day courses. Maintaining a low student to instructor ratio is important for initial courses where many students come in with minimal skills, but may be less important for refresher classes where students have already been certified for at least 2 years. The Department proposes to allow a student to instructor ratio for refresher classes of 12:1 in recognition that students come into the refresher with a skill set in place and to ease the instructor burden on training providers.

9. The U.S. EPA requires refresher classes for lead sampling technicians to be 4 hours in length. The current state lead rule requires this refresher course to be only 2 hours in length, which experience has shown is not enough time to adequately review all course material, provide hands-on practice time and a course test. The Department proposes to increase the required course length for the Lead Sampling Technician Refresher course to 4 hours.

10. Some people wishing to take training and become certified to conduct regulated lead activities have little education and low literacy levels. In addition, English may be a second language for some. All the courses require a course completion test be administered and that students pass the test with a score of at least 70% correct. To assist students with reading difficulties, the Department proposes to amend the rule to allow the training provider to read the course test to any student at the student's request.

11. The lead program is funded partially by a continuing lead grant from the U.S. EPA and through program revenue from certification fees. Fees have not been increase in rule since 2002. Proposed fee increases would be \$25 for the following individual 2-year certifications:

- Lead abatement supervisor: increase from \$225 to \$250.
- Lead abatement worker: increase from \$75 to \$100.
- Lead hazard investigator and lead inspector: increase from \$275 to \$300.
- Lead project designer and lead risk assessor: increase from \$325 to \$350.

- Lead sampling technician and lead-safe renovator: increase from \$50 to \$75.

A fee increase is proposed for company certifications of \$50, from \$75 to \$125 for a 2-year certification. A fee increase is proposed for the state lead examination from \$50 to \$75. In addition, training providers are currently the only regulated entity not also required to be a certified lead company. The program proposes adding the requirement for a training provider to also be a certified lead company.

12. Major sections of Ch. DHS 163 have not been substantially revised since 2002 or before. The Department proposes to update, correct, clarify and simplify or eliminate any outdated provisions in order to reflect current definitions, standards and best practices. There are no reasonable alternatives to the proposed rulemaking. The Department is required by Wis. Stats. § 254.15 (1), to develop and implement certification, training accreditation, and instructor approval requirements for lead-based paint activities.

Department Response to Legislative Council Rules Clearinghouse Recommendations

The Department accepted the recommendations made by the Legislative Council Rules Clearinghouse and modified the proposed rules where suggested with the following exception:

"1. Statutory Authority

c. Should the department add a cite to s. 254.168, Stats., as statutory authority? That section provides that the department may promulgate rules that require certain child-occupied facilities to have periodic lead investigations at intervals determined by the department or to otherwise demonstrate that the facility does not contain a lead hazard. It appears the rule modifies provisions within ch. DHS 163 promulgated pursuant to that authority."

While DHS 163 does establish standards for the conduct of lead risk assessment activities, it does not actually establish requirements for periodic lead investigations of certain child-occupied facilities.

Final Regulatory Flexibility Analysis

The issues raised by each small business during the public hearing(s).

The only public hearing testimony and comments received were from representatives of small businesses. None requested additional regulatory flexibility reviews or other measures to make it easier for small businesses to comply with the regulation. Each comment is described in detail in the Public Hearing Summary below along with the Department's response to the comments where applicable.

Any changes in the rule as a result of an alternative suggested by a small business and the reasons for rejecting any of those alternatives.

Please see the Public Hearing Summary.

The nature of any reports and estimated cost of their preparation by small businesses that must comply with the rule. The revisions proposed do not involve any changes to existing reporting requirements, nor were any changes requested through public comment or the public hearing.

The nature and estimated costs of other measures and investments that will be required by small businesses in complying with the rule.

1. Certified lead companies (abatement contractors, renovation contractors, and lead hazard investigation companies) that have certified lead abatement workers, supervisors, risk assessors, hazard investigators and inspectors: This rule will add a minor increase in biennial certification fees for companies and individuals, increasing the 2-year company fee by \$50, from \$75 to \$125, and each of the various individual 2-year certification fees by \$25 each. These fee increases would apply to approximately 2650 lead companies with a sector-wide impact of about \$66,250 per year with a cost per company of \$25 per year. The impact on individual certifications would be approximately \$63,750 per year, with a cost per person of \$12.50 per year.

2. Lead training providers: fees for training providers will only increase for one course, the Lead Sampling Technician Refresher course, for renewal of a 2-year accreditation, from \$50 to \$100, because the course is increasing from 2 hours to 4 hours in length. Accreditation fees are based on course hours.

The reason for including or not including in the proposed rule any of the following methods for reducing the rule's impact on small businesses, including additional cost, if any, to the department for administering or enforcing a rule which includes methods for reducing the rule's impact on small businesses and the impact on public health, safety and welfare, if any, caused by including methods in rules

The Department incorporated provisional certification to lessen any potential impact to lengthening the time period within which the Department is required to issue individual certification upon receipt of a complete application. The Department did not include in the proposed revision any measures to loosen reporting requirements or deadlines as those types of changes were not requested and would be outside of the scope of this revision.

Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis

Analysis

In response to the Clearinghouse Report, the following changes were made to the proposed rule order:

- Sections 254.167 and 254.168 were added as statutory authority in the rule summary.
- Formatting and punctuation changes were made throughout the rule summary and rule text.
- Notes referencing contact information for the department were standardized throughout the rule text.

Fiscal Estimate/Economic Impact Analysis

No changes were made to the fiscal estimate/economic impact analysis as a result of the public hearing and comment period.

Public Hearing Summary

The department began accepting public comments on the proposed rule via the Wisconsin Legislature Administrative Rules website, and through the Department's Administrative Rules Website on April 9, 2020. A public hearing was held on April 23, 2020, in via Skype or telephone. Public comments on the proposed rule were accepted until April 23, 2020.

List of the persons who appeared or registered for or against the Proposed Rule at the Public Hearing.

Registrant	Position Taken (Support or Opposed)
Doug Dalsing	No position taken
Oscar Aguirre	No position taken
Rocky Everly	No position taken

Summary of Public Comments to the Proposed Rule and the Agency's response to those comments, and an explanation of any modification made in the proposed rule as a result of public comments or testimony received at the Public Hearing.

Rule Provision	Public Comment	Department Response
DHS 163.14 (5) (c) 8. am.	<p>1. What is the definition of a "Porch" as used for clearance testing? Does a stoop, patio or a deck qualify as a porch? Is a fully enclosed unheated room attached to a dwelling considered a porch or is it an "unconditioned living space", as HUD defines it, rather than porch. It would make a difference as to which dust wipe would be used for clearance; i.e. 10 micrograms of lead per square foot for an unconditioned space (totally enclosed porch) or 40 micrograms of lead per square foot for a deck, stoop or open porch. Does only the porch where the waste was taken out need to be tested during clearance.</p> <p>2. Define Porch: Two parts to this. 1) Define what you call a porch, 2) Define WHICH porch they should do clearance on if there are multiple porches. (I understand that HUD's concept is it would be the porch used by the Lead Company to enter and exit for the project).</p>	<p>The department agrees that defining "porch" would clarify the applicability of the new dust wipe clearance standard. The department has reviewed other state and/or federal regulations and identified an existing regulatory definition of "porch" in Ch. DSPS 320: "'Porch' means an unenclosed exterior structure at or near grade attached or adjacent to the exterior wall of any building, and having a roof and floor." DHS has added this definition to the proposed rule order.</p> <p>The department determined that selection for sampling of one porch among multiple is more appropriate for technical guidance than for rule, since there are multiple factors that could determine which of any porches should be sampled.</p>
DHS 163.03 (82)	Which is the definition of a "Lead-Safe Company" is being repealed. The rest of the rule needs to be proof-read to eliminate the term "Lead Safe Company" such as the changes to DHS 163.10(1) where "Lead Safe Company has not been eliminated.	The department verified that all references to "lead-safe company" have been removed and replaced with "lead company."
DHS 163.03(16)	Should be amended to read: "Common Area" means a portion of a building, the land on which the building stands and other improvements on that land that are generally accessible to occupants of the a multifamily or child occupied building, The current definition implies that the use of the term "common area" relates to a multi-family or child care building. This change would clarify where the term should be used.	The current definition of "common area" includes a note specifying that it includes garages and boundary fences. Therefore, this change would necessitate careful review of at least some provisions of the rule concerning lead-safe property investigations and certificates to assure garages and fences are not inadvertently excluded. The nature of that review is outside the scope of this revision but will be noted for the future.

DHS 163.03 (61)	<p>Should be amended to read: "Lead-based paint" or "lead-bearing paint" means paint of any other surface coating material containing more than 0.009% by weight, calculated as lead metal, in the total nonvolatile content of liquid paint, equal to more than 0.5% lead by weight in the dried film of applied paint, or equal to or more than 1 milligram of lead per square centimeter in the dried film of applied paint.</p> <p>Wasn't the definition of lead in the liquid paint changed to 0.009% on April 19, 2009 with the problem of lead in the paint on children's toys? In the past the definition of lead-based paint has been equal to or more than 0.06% and equal to or more than 0.7 milligram of lead per square centimeter? The term "equal to" has been left out in the proposed rule. Setting the Action Level on a XRF would mean that the level of positive detection of lead must be set at 1.1 milligrams of lead per square centimeter which would be less stringent. Why was the definition changed to a lesser value? When the new definition was introduced in July of 2015 DHS said that the "more than" portion of the definition was wrong in 254 and that the "equal to or more than" should be used.</p>	The department is required to use the definition of "lead-bearing paint" that is in s. 254.11 (8), Stats.
163.10 (7) (b) 2., (8) (a) & (e)	<p>Make Certified Renovators certification good for 4-years. This is VERY confusing for renovators since their training is good for 4 years and the certification only 2 years. Some sign up for class after 2 years, and some skip the payment in the middle and then want to take a refresher after 4 years. I have polled renovators since February, and they almost ALL say make it 4 years – if you cannot afford to pay for double the license cost – you should not be in business.</p>	The department determined that this option is permissible under current rule language. Under DHS 163.10 (7) (b), initial certification remains valid for two years after the completion of the most recent training required under the discipline. Under 163.10 (8) (a), an individual may apply for recertification before certification expires, and the length of recertification under (e) is two years from the expiration date. As the department moves forward with implementing the rule revision, it will develop an administrative process, including revising application forms, to let applicants know of the option to apply for both initial and renewal lead-safe renovator certification at once in order to align the certification duration with the timeline for required refresher training.
DHS 163.10 (3) (c) 2.	Section 19: Please add wording that Lead Supervisors that fail will be Lead Workers. Otherwise they are out of work for a year.	Individuals who complete initial lead-safe renovation and lead abatement training are eligible for certification as lead abatement workers. All individuals who meet the requirements to attempt the lead supervisor certification exam have completed those

		trainings and are therefore eligible for certification as lead abatement workers in the event they are unable to pass the certification exam. Therefore, no change to the rule is needed. However, the department will incorporate notification of this option to applicants into its standard operating procedures as it makes other adjustments necessary to implement the rule revision.
DHS 163.10 (5) (c) 1. & 2.	Section 24: QUESTION, Is it true we do not need to ask for ID for REFRESHERS?	No. Section 24 applies only to the requirements for application to the department and not to requirements for accredited training courses. Training providers are required to comply with 163.20 (9) (a) and (am) relating to verifying student identification.
DHS 163.14 (1) (e)	Section 53: (DHS 163.14 (1) (e) 4. b.) THANK YOU: Plastic on vents.	No response needed.
DHS 163.14 (5) (c) 9. cr.	It is unclear what “the specific location on the property where clearance samples were taken” means in clearance reports. Are clearance reports supposed to somehow be more specific about sample locations, and if so, how?	This language is not new but in the proposed rule has been moved from DHS 163.14 (5) (c) 9. d. to DHS 163.14 (5) (c) 9. cr. The requirement has not changed. Documented methodologies must be used in determining and recording sampling locations.
DHS 163.14 (11) (g) 4.	What was DHS’s reasoning behind removing language allowing for the use of impermeable coverings, such as landscape fabric, other than plastic sheeting on exterior surfaces?	The department proposes removing this language to comply with U.S. EPA language under 40 CFR Part 763 and align with the U.S. Department of Housing and Urban Development Guidelines for Evaluation and Control of Lead-Based Paint, 2012 Edition, which had the option to use landscape fabric removed.
DHS 163.14 (11) (g) 1, DHS 163.14 (1) (e) (2)	The need to pre-clean being made a specific requirement for renovators is a good change, though the requirement should be made as clear in the abatement section.	The department’s proposed revision to the rule does require pre-cleaning prior to setting up interior and exterior containment for abatement. See DHS 163.14 (1)(e)2.
DHS 163.14 (1) (i); DHS 163.14 (11) (j)	Include a provision prohibiting bringing dirty furniture back into a home after cleaning.	While it is possible that bringing furniture contaminated with lead dust into a clean room after renovation or abatement could be hazardous, this change is outside the scope of this revision. The department has noted your concern and will monitor for additional information on this risk in order to provide evidence-based guidance on the matter when possible.

Summary of Items Submitted with this Report to the Legislature

Below is a checklist of the items that are attached to or included in this report to the legislature under s. 227.19 (3), Stats.

Documents/Information	Included in Report	Attached	Not Applicable
Final proposed rule -- Rule Summary and Rule Text		X	
Department response to Rules Clearinghouse recommendations	X		
Final Regulatory Flexibility Analysis	X		
Changes to the Analysis or Fiscal Estimate/Economic Impact Analysis	X		
Public Hearing Summary	X		
List of Public Hearing Attendees and Commenters	X		
Summary of Public Comments and Department Responses	X		
Fiscal Estimate/Economic Impact Analysis		X	
Revised Fiscal Estimate/Economic Impact Analysis			X
Small Business Regulatory Review Board (SBRRB) statement, suggested changes, or other material, and reports made under s. 227.14 (2g), Stats. and Department's response			X
Department of Administration (DOA) report under s. 227.115 (2), Stats., on rules affecting housing			X
DOA report under s. 227.137 (6), Stats., on rules with economic impact of \$20 MM or more			X
Public Safety Commission (PSC) energy impact report under s. 227.117 (2), Stats. and the Department's response, including a description of changes made to the rule			X