

STATEMENT OF SCOPE

DEPARTMENT OF HEALTH SERVICES

Rule No.: DHS 163

Relating to: Certification for the Identification, Removal and Reduction of Lead-Based Paint Hazards

Rule Type: Permanent

Type of Statement of Scope: Original

1. Finding/nature of emergency (Emergency Rule only): NA

2. Detailed description of the objective of the proposed rule:

The department proposes to revise and update ch. DHS 163 to bring it into alignment with revisions to Wis. Stat., Ch. 254, and federal law, 40 CFR Part 745. This includes revisions needed to incorporate provisions of 2015 Wisconsin Acts 55 and 122; to make other corrections, revisions and updates to statewide lead certification program requirements with the goal to simplify and clarify language and reduce regulatory burdens; and to adjust certain fees by a modest amount to ensure ongoing adequate program support.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

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. 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. 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. 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. 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 § 254.15 (1), Stats., to develop and implement certification, training accreditation and instructor approval requirements for lead-based paint activities.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

DHS 163 is promulgated under the authority of Wis. Stats. § 227.11 (2) (a), 250.04 (7), 250.041, 254.115, 254.15, 254.167, 254.172, 254.176 (1) and (3), 254.178 (2) and 254.179.

227.11 Extent to which chapter confers rule-making authority.

(2) Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

§ 250.04 (7) The department may promulgate and enforce rules and issue and enforce orders governing the duties of all local health officers and local boards of health and relating to any subject matter under the department's supervision that are necessary to provide efficient administration and to protect health.

Whoever violates a rule or order specified under this subsection shall be fined not less than \$10 nor more than \$100 for each offense, unless a different penalty is provided.

§ 250.041 Denial, nonrenewal and suspension of registration, license, certification, approval, permit and certificate based on certain delinquency in payment.

(1) Except as provided in sub. (1m), the department shall require each applicant to provide the department with the applicant's social security number, if the applicant is an individual, as a condition of issuing or renewing any of the following:

(c) A certification under s. 254.176 (1) or (3) or 254.20 (2), (3) or (4).

(d) An approval under s. 254.178 (2) (a).

(1m) If an individual who applies for or to renew a registration, license, certification, approval, permit or certificate under sub. (1) does not have a social security number, the individual, as a condition of obtaining the registration, license, certification, approval, permit or certificate, shall submit a statement made or subscribed under oath or affirmation to the department that the applicant does not have a social security number. The form of the statement shall be prescribed by the department of children and families. A registration, license, certification, approval, permit or certificate issued or renewed in reliance upon a false statement submitted under this subsection is invalid.

(2) The department of health services may not disclose any information received under sub. (1) to any person except to the department of children and families for the purpose of making certifications required under s. 49.857.

(3) The department of health services shall deny an application for the issuance or renewal of a registration, license, certification, approval, permit or certificate specified in sub. (1) or may, under a memorandum of understanding under s. 49.857 (2), suspend or restrict a registration, license, certification, approval, permit or certificate specified in sub. (1) if the department of children and families certifies under s. 49.857 that the applicant for or holder of the registration, license, certification, approval, permit or certificate is delinquent in the payment of court-ordered payments of child or family support, maintenance, birth expenses, medical expenses or other expenses related to the support of a child or former spouse or fails to comply, after appropriate notice, with a subpoena or warrant issued by the department of children and families or a county child support agency under s. 59.53 (5) and related to paternity or child support proceedings.

§ 254.115 Denial, nonrenewal and revocation of certification and permit based on delinquent taxes or unemployment insurance contributions.

(1) Except as provided in sub. (1m), the department shall require each applicant to provide the department with the applicant's social security number, if the applicant is an individual, or the applicant's federal employer identification number, if the applicant is not an individual, as a condition of issuing or renewing any of the following:

(a) Certification under s. 254.176.

(b) A certification card under s. 254.20 (3) or (4).

(1m) If an individual who applies for or to renew a certification, certification card or permit under sub. (1) does not have a social security number, the individual, as a condition of obtaining the certification, certification card or permit, shall submit a statement made or subscribed under oath or affirmation to the department that the applicant does not have a social security number. The form of the statement shall be prescribed by the department of children and families. A certification, certification card or permit issued or renewed in reliance upon a false statement submitted under this subsection is invalid.

(2) The department may not disclose any information received under sub. (1) to any person except to the department of revenue for the sole purpose of requesting certifications under s. 73.0301 and to the department of workforce development for the sole purpose of requesting certifications under s. 108.227.

(3) Except as provided in sub. (1m), the department shall deny an application for the issuance or renewal of a certification, certification card or permit specified in sub. (1) if the applicant does not provide the information specified in sub. (1).

(4) The department shall deny an application for the issuance or renewal of a certification, certification card or permit specified in sub. (1), or shall revoke the certification, certification card or permit specified in sub. (1), if the department of revenue certifies under s. 73.0301 that the applicant for or holder of the certification, certification card or permit is liable for delinquent taxes.

(5) The department shall deny an application for the issuance or renewal of a certification, certification card or permit specified in sub. (1), or shall revoke the certification, certification card or permit specified in sub. (1), if the department of workforce development certifies under s. 108.227 that the applicant for or holder of the certification, certification card or permit is liable for delinquent unemployment insurance contributions.

§ 254.15 Departmental duties.

(1) Develop and implement a comprehensive statewide lead poisoning or lead exposure prevention and treatment program that includes lead poisoning or lead exposure prevention grants under s. 254.151; any childhood lead poisoning screening requirement under rules promulgated under ss. 254.158 and 254.162; any requirements regarding care coordination and follow-up for children with lead poisoning or lead exposure required under rules promulgated under s. 254.164; responses to reports of lead poisoning or lead exposure under s. 254.166; any lead investigation requirements under rules promulgated under ss. 254.167 and 254.168; any lead hazard reduction requirements under rules promulgated under s. 254.172; certification, accreditation and approval requirements under ss. 254.176 and 254.178; any certification requirements and procedures under rules promulgated under s. 254.179; and any fees imposed under s. 254.181.

(2) Provide laboratory testing of biological and environmental lead specimens for lead content to any physician, hospital, clinic, municipality or private organization that cannot secure or provide testing through other sources. The department may not assume responsibility for blood lead analysis required in programs in operation on April 30, 1980.

(3) Develop or encourage the development of appropriate programs and studies to identify sources of lead poisoning or lead exposure, and assist other entities in the identification of lead in children's blood and of the sources of the lead poisoning or lead exposure.

(4) Provide technical assistance and consultation to local, county or regional governmental or private agencies to promote and develop lead poisoning or lead exposure prevention programs that afford opportunities for employing residents of communities and neighborhoods affected by lead poisoning or lead exposure from lead-bearing paint, and that provide appropriate training, education and information to inform these residents of the opportunities for employment.

(5) Provide recommendations for the identification and treatment of lead poisoning or lead exposure.

(6) Develop educational programs to communicate to parents, educators and officials of local boards of health the health danger of lead poisoning or lead exposure from lead-bearing paint among children.

§ 254.167 Conduct of lead investigation. Subject to the limitation under s. 254.174, the department may promulgate rules establishing procedures for conducting lead investigations of dwellings and premises. The rules promulgated under this section may include the following:

(1) Specific procedures for investigating, testing or sampling painted, varnished or other finished surfaces, drinking water, household dust, soil and other materials that may contain lead.

(2) Specific procedures for the notification of owners, operators, occupants or prospective occupants, mortgagees and lienholders of lead levels identified during a lead investigation and of any health risks that are associated with the lead level and condition of the lead found during the lead investigation.

(3) The form of lead investigation reports, the requirements for filing the reports with the department and the procedures by which members of the public may obtain copies of lead investigation reports.

(4) Requirements for the posting of warnings, where appropriate, of the presence of a lead hazard.

§ 254.172 Prevention and control of lead-bearing paint hazards in dwellings and premises

(1) Subject to the limitation under s. 254.174, the department may promulgate rules governing lead hazard reduction that the department determines are consistent with federal law.

(2) If a certified lead risk assessor or other person certified under s. 254.176 conducts a lead investigation of a dwelling or premises, he or she shall conduct the lead investigation and issue a report in accordance with any rules promulgated under s. 254.167. If the report indicates that the dwelling or premises meets criteria under s. 254.179 (1) (a) for issuance of a certificate of lead-free or of a certificate of lead-safe status, the lead risk assessor or other person shall issue the appropriate certificate, subject to s. 254.181.

§ 254.176 Certification requirements.

(1) Except as provided in sub. (2) and s. 250.041, and subject to sub. (3m) and s. 254.115, the department may establish by rule certification requirements for any person who performs lead hazard reduction or a lead management activity or who supervises the performance of any lead hazard reduction or lead management activity.

(3) Except as provided in s. 250.041 and subject to sub. (3m) and s. 254.115, the department may promulgate rules establishing certification requirements for persons required to be certified under this section. Any rules promulgated under this section:

(a) Shall include requirements and procedures for issuing, renewing, revoking and suspending under this section certifications issued under this section.

(c) Shall require completion of an appropriate training course accredited under s. 254.178 or of a training course determined by the department to be comparable to the appropriate training course under s. 254.178.

(d) May provide for requirements other than training as a condition for full certification.

(e) Shall specify fees for certifying persons under this section, except that no fee may be imposed on any person employed by the state or by any political subdivision of the state for a certification required to perform duties within the scope of the employment or on an individual who is eligible for the veterans fee waiver program under s. 45.44.

(f) Shall require the issuance of a photo identification card to each person certified under this section.

§ 254.178 Accreditation of lead training courses and approval of lead instructors.

(2) The department shall promulgate rules establishing requirements, except as provided in sub. (2m) and s. 250.041, for accreditation of lead training courses and approval of lead instructors. These rules:

(a) Except as provided in s. 250.041, shall include requirements and procedures for granting, renewing, revoking and suspending under this section lead training course accreditations and lead instructor approvals.

(c) May provide for full or contingent accreditation or approval.

(d) Shall specify fees for accrediting lead training courses and approving lead instructors, except that no fee may be imposed on an individual who is eligible for the veterans fee waiver program under s. 45.44.

§ 254.179 Rules for dwellings and premises.

(1) Subject to s. 254.174 and after review of ordinances of cities, towns and villages in this state, the department shall, by use of a research-based methodology, promulgate as rules all of the following:

(a) Except as provided in s. 254.18, the standards for a premises, dwelling or unit of a dwelling that must be met for issuance of a certificate of lead-free status or a certificate of lead-safe status to the owner of the premises, dwelling or unit of a dwelling, with the goal of long-term lead hazard reduction.

(b) The procedures by which a certificate of lead-free status or a certificate of lead-safe status may be issued or revoked.

(c) The period of validity of a certificate of lead-free status or a certificate of lead-safe status, including all of the following:

1. Authorization for the certificate of lead-free status to remain in effect unless revoked because of erroneous issuance or because the premises, dwelling or unit of the dwelling is not free of lead-bearing paint. The rules shall specify that the face of the certificate shall indicate that the certificate is valid unless revoked.

2. The standards limiting the length of validity of a certificate of lead-safe status, including the condition of a premises, dwelling, or unit of a dwelling, the type of lead hazard reduction activity that was performed, if any, and any other requirements that must be met to maintain certification, unless the certificate is earlier revoked because of erroneous issuance or because the premises, dwelling, or unit of the dwelling is not safe from lead-bearing paint hazards. The rules shall specify that the face of the certificate shall indicate the certificate's length of validity.

(d) A mechanism for creating a registry of all premises, dwellings or units of dwellings for which a certificate of lead-free status or a certificate of lead-safe status is issued.

(e) The requirements for a course of up to 16 hours that a property owner or his or her employee or agent may complete in order to receive certification of completion and the scope of the lead investigation and lead hazard reduction activities that the owner, employee or agent may perform following certification, to the extent consistent with federal law.

(2) By January 1, 2003, and every 2 years thereafter, the department shall review the rules under sub. (1) and shall promulgate changes to the rules if necessary in order to maintain consistency with federal law.

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule :

The department estimates it will take approximately 1,040 hours to develop the proposed rule amendments. This includes the time required for research and analysis, coordinating a technical advisory committee, drafting rule language, preparing related documents, holding a public hearing and communicating with stakeholders and other affected parties.

6. List with description of all entities that may be affected by the proposed rule :

Persons who conduct regulated lead activities, including: lead abatement contractors; lead investigation consultants; renovation contractors, rental property owners and any other persons who conduct paint disturbing work for compensation in dwellings or child-occupied facilities built before 1978. Other affected entities: training providers of accredited lead courses, schools serving children under 6 years of age, day care providers, pre-schools and any other entity that meets the definition of a child-occupied facility.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule :

40 CFR Part 745 Subparts D, E, L and Q contain the definitions of lead-based paint hazards and the requirements for lead-safe renovation, lead-based paint activities (including abatement and lead investigations), and for state and tribal lead programs. The Wisconsin lead program is authorized by the

U.S. EPA under Subpart Q of 40 CFR Part 745 to administer its lead certification program in lieu of EPA administering one in Wisconsin. However, EPA has since made changes to its regulation with which Wisconsin is required to comply in order to retain its authorization. The main revision was the addition of language in Subpart Q at § 745.327 (b) (3) (ii) requiring a state to have the authority to assess administrative or civil fines, including a maximum penalty authority for any violation in an amount no less than \$5,000 per violation per day. Wisconsin 2015 Act 55 provided this authority but current administrative code still provides for a maximum penalty of just \$1,000 per violation.

40 CFR Part 745 Subpart L, Lead-Based Paint Activities. Subpart L at § 745.225 contains training course accreditation requirements for the lead renovator and dust sampling technician courses, including required length of courses. DHS 163 includes provisions for the accreditation of similar courses, including lead sampling courses, but revisions are necessary to bring the course length of the lead sampling technician refresher course in DHS 163 into compliance with the EPA course requirements as described in Subpart L.

8. Anticipated economic impact of implementing the rule:

The proposed rule is anticipated to have a moderate economic impact if promulgated. Most of the impact will be on individual certification fees based on the modest proposed increase. The proposed rule will have minimal effect on small businesses.

Contact Person:

Davis Ciotola

608-266-1279

Davis.ciotola@dhs.wisconsin.gov