

Clearinghouse REVIEW

March–April 2006
Volume 39, Numbers 11–12

Journal of
Poverty Law
and Policy

MORE:

Accommodate Deaf
Inmates' Needs

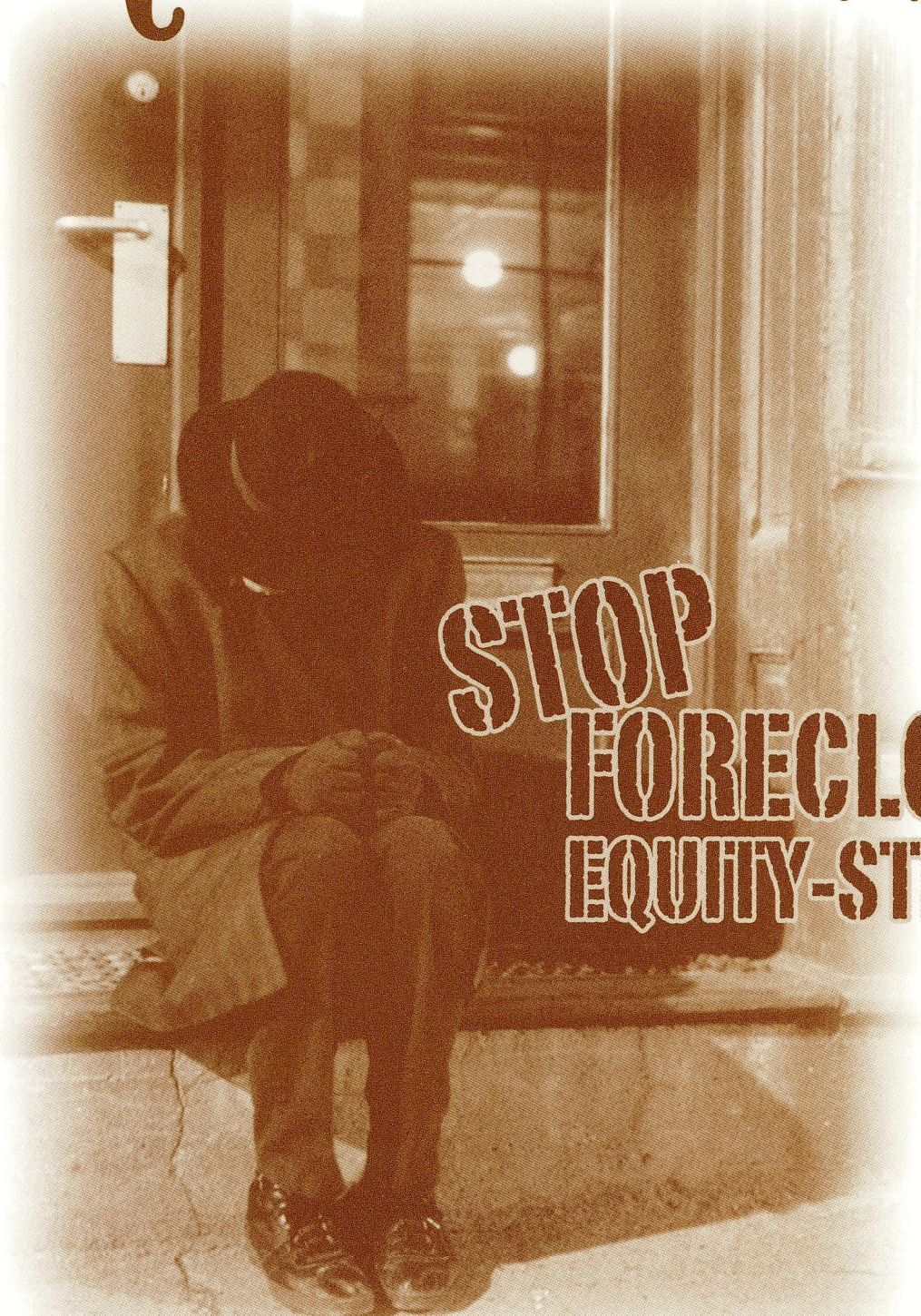
Challenge Section 8
Voucher Termination

Enable Young Parents and
Victims of Domestic and
Sexual Violence to Finish School

Protect Children from
Lead Dust Hazards

Offer Health Insurance to
Every Child

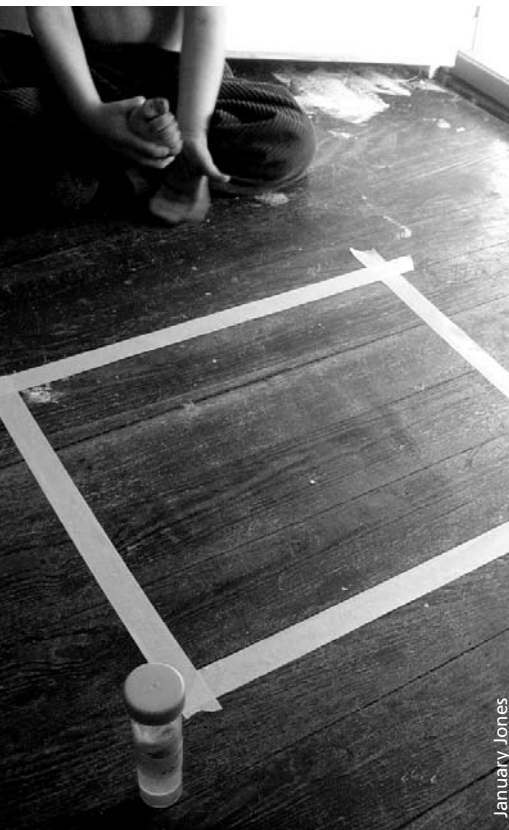
Know Administrative Law



**STOP
FORECLOSURE
EQUITY-STRIPPING
SCAMS**

Sargent Shriver
National Center
on Poverty Law
Founded 1967

Taking action to end poverty



January Jones

Lead Dust as Solid Waste: A New Legal Strategy for Achieving Lead Safety

By Thomas G. Neltner

Lead-sampling technicians tape off a square to test for lead-dust contamination as a young child watches.

Thomas G. Neltner
Director of Training and Education

National Center for Healthy Housing
10227 Wincopin Circle, Suite 200
Columbia, MD 21044
410.772.2776
tneltner@nchh.org
neltner@ikecoalition.org

An all-too-typical scenario: A mother receives a call from the local health department. The test results for her 2-year old daughter show that she has an elevated blood lead level.¹ At the daughter's 24-month checkup several weeks ago, the nurse took a blood sample to check for lead poisoning as required by Medicaid.² The mother recalls her daughter's scream when the needle went in. She hoped that many years would pass before she heard it again. She will not be so lucky. If the doctor and health department staff follow the U.S. Centers for Disease Control and Prevention protocols, her daughter will need to be tested at least once every three months until she is no longer lead-poisoned or turns 6 years old.³

From the case manager at the local health department the mother learns that elevated blood lead levels are known to cause permanent behavior changes, such as attention deficit hyperactive disorder and violent behavior.⁴ The lead also lowers a child's IQ (intelligence quotient).⁵ Two weeks ago, her daughter's life held so much promise. Now the horizon looks cloudy and dark.

¹See U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, MANAGING ELEVATED BLOOD LEAD LEVELS AMONG YOUNG CHILDREN: RECOMMENDATIONS FROM THE ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION 42 (Birt Harvey ed., 2002), available at www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm (explaining what elevated blood lead level means). An elevated blood lead level is a level of lead that is in the blood of a child younger than 6 years and is more than ten micrograms of lead per deciliter of lead (10 µg/dL). *Id.* at 4. See generally Greg Spiegel, *Childhood Lead Poisoning Prevention*, 37 CLEARINGHOUSE REVIEW 483 (Jan.–Feb. 2004).

²Social Security Act § 1905(r), 42 U.S.C. § 1396d (2005) (requiring that young children receive a blood lead test as part of the required Early and Periodic Screening, Diagnostic and Treatment (EPSDT) screening); see U.S. CENTERS FOR MEDICARE AND MEDICAID SERVICES, EPSDT BENEFITS, available at www.cms.hhs.gov/MedicaidEarlyPeriodicScrn/02_Benefits.asp (last modified Dec. 14, 2005). See generally Anne M. Wengrovitz & Manjusha P. Kulkarni, *Strategies to Improve Medicaid Screening and Treatment for Lead Poisoning*, 39 CLEARINGHOUSE REVIEW 26 (MAY–JUNE 2005).

³See U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1, at 51 tbl. 3.3.

⁴For an explanation of the health effects of lead in children, see Work Group of the Advisory Committee on Childhood Lead Poisoning Prevention, *Appendix: A Review of Evidence of Adverse Health Effects Associated with Blood Lead Levels < 10 µg/dL in Children*, exec. sum. iv, in U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING LEAD POISONING IN YOUNG CHILDREN (2005), available at www.cdc.gov/nceh/lead/Publications/PrevLeadPoisoning.pdf; Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, Case Studies in Environmental Medicine (CSEM): Lead Toxicity (2000), www.atsdr.cdc.gov/HEC/CSEM/lead/ (course SS3059, "Lead Toxicity: Physiologic Effects" module).

⁵See Work Group of the Advisory Committee on Childhood Lead Poisoning Prevention, *supra* note 4.

The health department tests the mother's apartment for lead hazards and finds high levels of lead in the dust on the floor. It also finds high lead levels at her daughter's child care center. The health department's lead risk assessment recommends specific actions needed to eliminate the lead hazards. But the mother's landlord refuses to clean up the lead hazards and blames the lead poisoning on the child care center. The child care center blames it on the landlord. The health department tells the mother that it lacks the authority to order either party to clean up the lead hazards.

In the midst of the finger pointing, the mother is stuck. She lacks the resources to move or find a new child care facility, and anything she finds might not be much better. She feels scared to let her daughter play anywhere, but keeping the child off the floor is impossible. The health department tells her that cleaning will help but will not keep the lead dust away.⁶ The lead dust primarily comes from deteriorated lead-based paint on the windows, doors, and walls.⁷

This scenario plays itself out every day in thousands of homes across the United States. Although the federal government set a goal of eliminating lead poisoning as a public health problem by 2010, the Centers for Disease Control and Prevention estimate that 310,000 children younger than 6

years are at risk of lead poisoning—0.7 percent of all children younger than 6.⁸ The number is much lower than in the mid-1990s but is little consolation to families of lead-poisoned children.⁹

Options for Action

In progressive jurisdictions such as Chicago and Maryland, the health department routinely orders that lead hazards be cleaned up whenever and wherever they are found.¹⁰ Families in the rest of the country, however, often are stuck with the choice of doing the work themselves, moving to a safer place, or convincing their property manager to fix the problem. For low-income families, doing the work themselves or moving to safer places is a difficult, if not impossible, option.¹¹ They lack the expertise and resources to do the work, and finding a safe place takes money that they do not have.

Congress anticipated this problem when it adopted the Residential Lead-Based Paint Hazard Reduction Act of 1992.¹² This Act has been helpful in reducing lead poisoning, but its success is incomplete—an unfulfilled promise. Since 1996, the Act has required the Environmental Protection Agency (EPA) to adopt lead poisoning prevention regulations controlling “renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint



January Jones

Lead dust can be tracked onto floors from other areas of the home such as basements.

⁶See U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1, at 46.

⁷*Id.* at 17.

⁸For the most recent statistics available, see U.S. Centers for Disease Control and Prevention, *Blood Lead Levels—United States, 1999–2002*, 54 MORBIDITY AND MORTALITY WEEKLY REPORT, May 27, 2005, 513, available at www.cdc.gov/mmwr/preview/mmwrhtml/mm5420a5.htm. “For 1999–2002, the overall prevalence of elevated BLLs [blood lead levels] for the U.S. population was 0.7% (Table 1), a decrease of 68% from 2.2% in the 1991–1994 survey. The largest decrease (72%) in elevated BLLs [blood lead levels], from 11.2% to 3.1%, was among non-Hispanic black children aged 1–5 years, consistent with a previous decline from 1988–1991 to 1991–1994 (Figure).” *Id.*

⁹*Id.*

¹⁰See CHICAGO, ILL., MUN. CODE ch. 7-4 (codified through Council Journal of Dec. 7, 2005, supp. no. 14, update 5), available at <http://municode.com/resources/gateway.asp?pid=13322&sid=13> (“Lead-Bearing Substances”); MD. CODE ANN., ENVIR. §§ 6-801 through 6-852, available at www.mde.state.md.us/Programs/LandPrograms/LeadCoordination/enforcement.asp (limited to housing and does not address public or commercial buildings) (last visited Jan. 28, 2006).

¹¹U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1, at 46.

¹²Residential Lead-Based Paint Hazard Reduction Act of 1992, 15 U.S.C. § 2682(c) (2005); see 42 U.S.C. § 4851a (2005) (listing seven purposes of the statute). For other litigation strategies using this Act, see Maria Rapuano & Anne M. Phelps, *Leveraging the Federal Lead Hazard Disclosure Law to Improve Housing Conditions*, 39 CLEARINGHOUSE REVIEW 37 (May–June 2005); Gregory D. Luce & Anne M. Phelps, *Using the Federal Lead Hazard Disclosure Rule’s Private Right of Action for Compensatory Damages and Broad-Based Injunctive Relief*, *id.* at 89.

hazards.”¹³ On January 10, 2006—almost ten years after the 1996 deadline—the EPA finally proposed the rules (see sidebar) but excluded public and commercial buildings even if they house child care centers.¹⁴ As a result, the proposed rule falls short of the statutory mandate.

Lead Dust as Solid Waste

Despite the EPA’s inaction in meeting its statutory mandate under the Residential Lead-Based Paint Hazard Reduction Act, the agency took enforcement action on two lead-dust cases using an unexpected tool: the Resource Conservation and Recovery Act of 1976. Section 7003 of the Act authorizes the EPA to protect the public from solid wastes that may present an imminent and substantial endangerment to health or the environment.¹⁵ While the Resource Conservation and Recovery Act is traditionally—and justifiably—viewed as a law focused on the regulation of hazardous waste from manufacturing operations and the disposal of solid waste, it is also an important tool to protect children from lead-dust hazards.¹⁶ In the following two actions, the EPA used this authority to protect children from lead poisoning by solid waste generated from the deterioration of lead-based paint in the home and from the active removal of lead-based paint by dangerous techniques such as sandblasting.

In 2000, in *In re 17th Street Revocable Trust*, the EPA issued a unilateral administrative



January Jones

Dust from old, lead-painted windows is often the culprit in lead-poisoning cases.

order requiring the cleanup of lead-dust hazards at a seventy-seven-unit, multifamily, residential building in Washington, D.C.¹⁷ The EPA took this extraordinary action when the District of Columbia was unable to enforce six housing deficiency notices issued between 1990 and 1997.¹⁸ Lacking the authority to demand a cleanup under its statutory authority tailored to lead-based paint pursuant to the Residential Lead-Based Paint Hazard Reduction Act, EPA Region III used its authority under the Resource Conservation and Recovery Act to declare the lead dust and detached paint chips to be a solid waste that posed an imminent and substantial endangerment to residents.¹⁹ The condi-

¹³Residential Lead-Based Paint Hazard Reduction Act of 1992, 15 U.S.C. § 2682(c) (2005).

¹⁴71 Fed. Reg. 1588 (Jan. 12, 2006) (to be codified at 40 C.F.R. pt. 745).

¹⁵Resource Conservation and Recovery Act of 1976 § 7003(a), 42 U.S.C. § 6973(a) (2005).

¹⁶See U.S. Environmental Protection Agency, Resource Conservation and Recovery Act (Oct. 18, 2005), www.epa.gov/region5/defs/html/rcra.htm.

¹⁷*In re 17th Street Revocable Trust*, No. RCRA-3-2000-0001TH, at 2 (U.S. Environmental Protection Agency (EPA) July 7, 2000) (unilateral admin. order), available at www.ikecoalition.org/documents/17th_Street_Revocable_Trust.pdf [hereinafter 17th Street Revocable Trust Order]; Letter from Bradley M. Campbell, Regional Administrator, U.S. EPA Region III, to John R. Redmond, Managing Member, New 4775 Huron L.L.C., and Former Trustee, 17th Street Revocable Trust (July 7, 2000), available at www.ikecoalition.org/documents/17th_Street_Revocable_Trust.pdf; see also Press Release, U.S. Environmental Protection Agency, D.C. Landlord Agrees to Emergency Cleanup of Lead-Based Paint (July 12, 2000), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/3e91102a2ecbe7af852570d60070fb60?OpenDocument>.

¹⁸17th Street Revocable Trust Order, *supra* note 17, at 11.

¹⁹*Id.* at 18.

White Glove Test Coming to Your Home? Federal Restrictions on Renovation and Remodeling Proposed

A long-awaited rule, proposed by the U.S. Environmental Protection Agency (EPA) on January 10, 2006, regulates renovation work done in virtually all housing built before 1978.¹ Any contractor who disturbs more than two square feet of paint on a housing component will need to follow detailed work practices and verify that the area was cleaned by using a new “white glove” test.²

Under the “white glove” test, a contractor doing interior work will be required to verify that no lead-dust hazards remain by wiping each windowsill and a forty-square-foot area of uncarpeted floor with a wet, white cloth.³ The work “passes” when the contractor determines that all of the white wipes are cleaner than a white card from the EPA.⁴

According to current EPA rules, lead dust on floors in target housing and child-occupied facilities is a hazard when there is more than forty micrograms

of lead per square foot ($40 \mu\text{g}/\text{ft}^2$).⁵ The lead must be sampled using a special dust wipe procedure.⁶

Lead dust at $40 \mu\text{g}/\text{ft}^2$ is essentially invisible.⁷ The dust level is equivalent to a small packet of sweetener spread over one-third of a football field (i.e., 25,000 ft^2).⁸ Even at this level, researchers estimate that 18 percent of young children living in a home with lead dust at $40 \mu\text{g}/\text{ft}^2$ of the floor will be lead-poisoned.⁹

The EPA estimates that this rule, when finalized, will protect 855,000 children from exposure to lead hazards annually.¹⁰ The net economic benefits to society from the rule are between \$1.9 billion and \$6 billion annually, depending on the model that the EPA uses.¹¹ As proposed, the rule will have an impact on an estimated 4.4 million renovations annually, with each required to pass a white glove test or dust clearance examination.¹² The EPA estimates that contractors and property managers will spend \$613 million annually to comply with the rule.¹³

¹71 Fed. Reg. 1588 (Jan. 10, 2006) (to be codified at 40 C.F.R. pt. 745).

²*Id.* at 1614–15.

³*Id.* at 1630 (proposed 40 C.F.R. § 745.85(b)). The Environmental Protection Agency (EPA) allows the use of a more expensive and time-consuming dust-wipe test that involves an analysis of the cleaning sample for lead. See *id.* at 1631 (proposed 40 C.F.R. § 745.85(b)(1)(iii)).

⁴*Id.*

⁵40 C.F.R. § 745.65(b) (2005).

⁶*Id.* § 745.65(a) (defining wipe sample).

⁷71 Fed. Reg. 1588, 1590 (Jan. 10, 2006) (to be codified at 40 C.F.R. pt. 745).

⁸A packet of sweetener is one gram or one million micrograms. One gram per 25,000 ft^2 is the same as $40 \mu\text{g}/\text{ft}^2$.

⁹U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, MANAGING ELEVATED BLOOD LEAD LEVELS AMONG YOUNG CHILDREN: RECOMMENDATIONS FROM THE ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION 18 (2002), www.cdc.gov/nceh/lead/CaseManagement/caseManage_main.htm; see also *id.* at 35 fig. 2.3 (Relationship of Dust Lead Levels to Blood Lead Levels in Children).

¹⁰U.S. ENVIRONMENTAL PROTECTION AGENCY, DOC. NO. ID EPA-HQ-OPPT-2005-0049-0101, ECONOMIC ANALYSIS FOR THE RENOVATION, REPAIR, AND PAINTING PROGRAM PROPOSED RULE at ES-6 tbl. ES-4 (2005), available at www.regulations.gov (insert “EPA-HQ-OPPT-2005-0049” or “paint” in the “keyword or ID field” and press “submit”).

¹¹U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 10, at ES-8 Exhibit ES-6.

¹²71 Fed. Reg. 1588, 1621 (Jan. 10, 2006) (to be codified at 40 C.F.R. pt. 745); see also U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 10, at ES-3 Exhibit ES-1.

¹³U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 10, at ES-5 Exhibit ES-3 & ES-6 Exhibit ES-6.

In proposing the rule, the EPA acted pursuant to Title X of the Toxic Substances Control Act of 1976.¹⁴ This act states:

Within 4 years after October 28, 1992, the Administrator shall revise the regulations under subsection (a) of this section to apply the regulations to renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.... If the Administrator determines that any category of contractors engaged in renovation or remodeling does not require certification, the Administrator shall publish an explanation of the basis for that determination.¹⁵

The EPA committed to proposing the rule before the end of 2005—almost ten years after the statutory deadline of 1996—when Sen. Barack Obama (D-Ill.) held up Senate approval of several EPA political appointments, and Public Employees for Environmental Responsibility and ten other groups filed in June 2005 a notice of intent to sue the EPA for its failure to perform its nondiscretionary duty under 15 U.S.C. § 2682(c); in December 2005, they filed a lawsuit.¹⁶

The EPA's proposed rule is a major, partial step toward fulfilling the statutory mandate.¹⁷ The EPA has many difficult decisions to make as it finalizes the rule. It must balance the benefits to more than 850,000 children against compliance costs of more than \$600 million a year.¹⁸ Thus public comments are essential. They are due on April 10, 2006, although, on major rules such as this, the EPA typically extends the comment period.¹⁹



January Jones

Lead paint chipping in characteristic squares along a window frame.

¹⁴Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 (2005).

¹⁵Residential Lead-Based Paint Hazard Reduction Act of 1992 § 1021(a), amending Toxic Substances Control Act of 1976 § 402, 15 U.S.C. § 2682(c) (2005).

¹⁶See Toxic Substances Control Act § 3, 15 U.S.C. § 2619(a)(1) (2005) (authorizing citizens to file civil actions against EPA's administrator "to compel the Administrator to perform any act or duty under the chapter which is not discretionary"); Press Release, Sen. Barack Obama (D-Ill.), Obama Amendment Would Help Prevent Lead Poisoning in Children (June 29, 2005), http://obama.senate.gov/press/050629-obama_amendment_would_help_prevent_lead_poisoning_in_children/; Press Release, Public Employees for Environmental Responsibility, EPA Sued for Ignoring Lead Poisoning Hazards (Dec. 20, 2005), www.peer.org/news/news_id.php?row_id=620; see also Press Release, Sen. Barack Obama, Obama Applauds EPA's Commitment to Write Long-Delayed Laws to Protect Kids from Lead Paint (July 25, 2005), http://obama.senate.gov/press/050725-obama_applauds_epas_commitment_to_write_long-delayed_laws_to_protect_kids_from_lead_paint/index.html.

¹⁷Without explanation or comment, the EPA narrowed the scope of the proposed rule to exclude public buildings constructed before 1978 and commercial buildings that create lead-based paint hazards. See Residential Lead-Based Paint Hazard Reduction Act of 1992 § 1021(a), amending Toxic Substances Control Act of 1976 § 402, 15 U.S.C. § 2682(c) (2005). Thus this proposed rule fails to fulfill the mandate at 15 U.S.C. § 2682(c). See quotation in text accompanying *supra* note 15.

¹⁸U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 10, at ES-7 Exhibit ES-3.

¹⁹71 Fed. Reg. 1588, 1588 (Jan. 10, 2006) (to be codified at 40 C.F.R. pt. 745).



January Jones

Remediation workers clean lead-dust-contaminated community center.

tions in this residential building—and the local authority's inability to force cleanup—are not unusual.²⁰

In 2001, in *Group I Management and M275 of Fall River, Massachusetts*, the EPA found that

the building owner contracted to sandblast the paint on the exterior of the first floor of an old, three-story building in Fall River, Massachusetts.²¹ Tenants observed dust coming through the floors and out of the windows.²² One of those tenants was preparing to open a dance studio catering primarily to children.²³ The tenants contacted the Massachusetts Division of Occupational Safety, which asked the EPA for help. The EPA found that the sand and paint debris contained between 868 and 2,790 parts per million lead—typical but high levels of lead in dust.²⁴ EPA Region I used its authority under the Resource Conservation and Recovery Act to order the building owner to abate the lead at the building and to clean up lead dust on the floor so that levels were less than the standard of forty micrograms of lead per square foot (40 µg/ft.²) established in 40 C.F.R. § 745.65.²⁵

In these two actions the EPA acknowledged the compelling science finding that lead dust poisons children and that the brain damage to children is likely permanent.²⁶ The EPA also acknowledged that lead-based paint could be a solid waste when it turned to dust, chips, or flakes.²⁷ With an estimated 310,000 lead-poisoned children in the United States, the danger from lead dust is well beyond the “may present an imminent

²⁰Based on my experience with lead-dust samples of more than 100 homes. The EPA did find very high levels of lead dust in the window well, but the levels were less than an order of magnitude greater than the standard established in 40 C.F.R. § 745.65(b) (2005). The EPA issued the order in 2000 before it finalized the lead hazard standards on January 5, 2001, and so it did not rely on 40 C.F.R. § 745.65(b).

²¹*Group I Management and L275 LLC of Fall River, Massachusetts*, No. RCRA 01-2001-0072, at 7 (U.S. EPA Sept. 4, 2001) (letter order from Sam Silverman, Acting Director, Office of Environmental Stewardship, U.S. EPA Region I, to Paul Carrigg, Group I Management and M275 LLC (Sept. 4, 2001) (requiring cleanup, testing, analysis, and reporting under Section 7003 of the Resource Conservation and Recovery Act), available at www.ikecoalition.org/documents/RCRA_Falls_River_Order_8-17-04.pdf) [hereinafter *Group I Management Order*].

²²*Id.*

²³*Id.*

²⁴*Id.* The EPA inspector took samples and measured the percentage of lead in the sample. However, the EPA standard in 40 C.F.R. § 745.65 is based on the amount of lead that can be wiped up per square foot. Both methods are good predictors of lead poisoning in children. See U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1, at 17.

²⁵*Group I Management Order, supra* note 21, at 3 (Section II.A.2).

²⁶See 17th Street Revocable Trust Order, *supra* note 17, at 4–5 (citing, e.g., U.S. EPA, RISK ANALYSIS TO SUPPORT STANDARDS FOR LEAD IN PAINT, DUST AND SOIL, vols. 1–2 (1998)); *Group I Management Order, supra* note 21 (Attachment I, Statement of Facts, item No. 11).

²⁷Resource Conservation and Recovery Act of 1976 § 1004(27), 42 U.S.C. § 6903(27) (2005) (defining “solid waste”); 17th Street Revocable Trust Order, *supra* note 17, at 17 (“VI. Conclusions of Law and Determination B”); *Group I Management Order, supra* note 21, at 2 (“Part 1. Legal Basis for Issuing Order Under RCRA Section 7003, Determination B”).

and substantial endangerment to health or the environment” standard called for by the statute.²⁸

Powerful Precedent

In its two enforcement actions, the EPA essentially determined that

- dust in housing or a commercial building that contains lead and detached lead-based paint chips and flakes is a solid waste;²⁹
- the presence of this dust constitutes handling, storage, treatment, or disposal of the solid waste;
- the lead dust may present an “imminent and substantial endangerment to health or the environment” arising from its past or present handling, storage, treatment, or disposal if it is a “dust-lead hazard” established in 40 C.F.R. § 745.65(b);
- the owner of the building contributed to the handling, storage, treatment, or disposal of the lead dust (or some combination of them) by not removing it; and
- under Section 7003 of the Resource Conservation and Recovery Act, the EPA may file suit to restrain the owner from the handling, storage, treatment, or disposal of the lead dust (or some combination of them) and take action as may be necessary to protect public health and the environment.³⁰

The EPA’s two enforcement actions set a powerful precedent that tenants, consumers, community-based groups, advocates, and attorneys can use to eliminate lead hazards in residential, commercial, and public buildings. Most important, the EPA’s determinations can be used to prevent a case of lead poisoning, rather than responding only after the damage has been done.

While helpful to advocates and attorneys seeking to eliminate lead hazards, however, the EPA’s determinations appear to do little good if the EPA is not willing to exercise its statutory authority routinely.³¹

Citizen Suits

But appearances can be deceiving. When Congress adopted the citizen suit provisions as part of the Hazardous and Solid Waste Amendments of 1984, Congress recognized that citizens might not be able to wait for the EPA to exercise its discretion when the agency was unwilling or unable to do so.³² Congress authorized citizens to bring suit to compel the cleanup of solid waste that may present an imminent and substantial endangerment to health or the environment.³³ The EPA’s enforcement actions and determinations also are a powerful precedent for citizen suits authorized by the Act.

The Resource Conservation and Recovery Act allows persons to commence a civil action on their own behalf

²⁸Resource Conservation and Recovery Act of 1976 § 7003, 42 U.S.C. § 6973(a) (2005) (for the EPA’s authority); *id.* § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (for citizen suit authority).

²⁹The EPA’s determinations in these two actions treated the lead-based paint waste as a solid waste, not a hazardous waste. The EPA did not need to determine whether the lead-based paint waste was a hazardous waste to exercise its authority under Section 7003 of the Resource Conservation and Recovery Act because its authority under the Act applies to all solid waste and not just regulated hazardous waste. See U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA-530-K-04-005, RCRA [RESOURCE CONSERVATION AND RECOVERY ACT] IN FOCUS: CONSTRUCTION, DEMOLITION, AND RENOVATION 8 (2004) (explaining the regulatory status of lead-based paint debris from housing). The EPA was exercising its broad authority under the Act’s Section 7003 (42 U.S.C. § 6973(a) (2005)) to protect public health and the environment from imminent and substantial endangerment arising from the management of solid waste. In these cases, the building owners’ failure to remove lead-based paint debris constituted handling or storage of solid waste. 17th Street Revocable Trust Order, *supra* note 17, at 18 (“Conclusion of Law and Determinations, Determination E”); Group I Management Order, *supra* note 21, at 2 (“Legal Basis for Issuing Order under RCRA [Resource Conservation and Recovery Act] Section 7003, Determination E”).

³⁰Resource Conservation and Recovery Act of 1976 § 7003, 42 U.S.C. § 6973(a) (2005); 17th Street Revocable Trust Order, *supra* note 17, at 18; Group I Management Order, *supra* note 21, at 2.

³¹I was unable to locate any more examples of similar actions by the EPA. Readers who are aware of other such actions are encouraged to contact me at 410.772.2776 or tneltnern@nchh.org.

³²Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6972(f) (2005) (adding the citizen suit authority).

³³*Id.*

*against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.*³⁴

The civil action must be “brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur.”³⁵ The district court has the authority to “order such person to take such other action as may be necessary.”³⁶

Before commencing the civil action, the plaintiff must give specific written notice to the EPA, the state in which the alleged endangerment occurred, and any person alleged to have contributed or to be contributing to the endangerment at least ninety days in advance.³⁷ If the EPA or

the state has commenced or is diligently pursuing the case, the plaintiff may not commence action.³⁸

The citizen suit provision allows the plaintiff to eliminate the endangerment.³⁹ It does not allow for recovery of plaintiff’s damages or collection of civil penalties.⁴⁰ However, the law allows the court to award the prevailing party “costs of litigation (including reasonable attorney and expert witness fees).”⁴¹ It does not “restrict any right any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief.”⁴²

Indiana Test Case

I could find no precedent for the use of the Resource Conservation and Recovery Act’s citizen suit authority to secure the cleanup of lead hazards. So, as part of my work as executive director of Improving Kids’ Environment, I decided to test this authority in a relevant case.⁴³ In 2003 in Terre Haute, Indiana, a child was lead-poisoned. The risk assessment by the local health department identified serious lead hazards with lead dust levels more than six times the EPA’s standard in

³⁴Resource Conservation and Recovery Act of 1976 § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) (2005) (emphasis added); see also *id.* § 1004(15), 42 U.S.C. § 6903(15) (defining “person” as “an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and [including] each department, agency, and instrumentality of the United States”); *id.* § 1004(27), 42 U.S.C. § 6903(27) (defining “solid waste”); see 40 C.F.R. § 254 (2006) for the EPA’s regulations implementing Section 7002.

³⁵Resource Conservation and Recovery Act of 1976 § 7002(a), 42 U.S.C. § 6972(a) (2005).

³⁶*Id.*

³⁷*Id.* § 7002(b)(2)(A), 42 U.S.C. § 6972(b)(2)(A).

³⁸*Id.* § 7002(b)(2)(B), 42 U.S.C. § 6972(b)(2)(B).

³⁹*Id.* § 7002(a), 42 U.S.C. § 6972(a).

⁴⁰*Id.* A civil penalty does not protect public health and the environment. It is available in citizen suits for actions pursuant to Section 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) (authorizing citizens to enforce violations of any permit, standard, regulation, condition, requirement, prohibition, or order without regard to whether the situation may present an imminent and substantial endangerment); however, none of these violations applies in the case of lead-based paint waste in residential property. A civil penalty is not available for suits pursuant to Section 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), which applies to any situation that may present an imminent and substantial endangerment.

⁴¹*Id.* § 7002(e), 42 U.S.C. § 6972(e).

⁴²*Id.* § 7002(f), 42 U.S.C. § 6972(f).

⁴³For more information on Improving Kids’ Environment, see www.ikecoalition.org.

40 C.F.R. § 745.65(b).⁴⁴ After the landlord refused to clean up the property, the tenants moved to safer property.⁴⁵ The landlord threatened to rent or sell the property.⁴⁶ The local health department declared the property unfit for habitation until it was cleaned up.⁴⁷

I worked with the mother of the lead-poisoned child to file, under the Resource Conservation and Recovery Act, a notice of intent to sue the landlord for lead dust that presented imminent and substantial endangerment to children.⁴⁸ In response, the landlord immediately agreed to clean up or demolish the property.⁴⁹ He later learned that, because he was cleaning up or demolishing the property with the primary purpose of eliminating the lead-based paint hazards and not as part of a renovation or remodeling project, he needed to follow the state lead-based paint abatement rules.⁵⁰ Licensed contractors must perform the lead abatement, and the property must pass a clearance examination by a licensed risk assessor or lead inspector.⁵¹

The mother filed a civil action to recover damages.⁵² As of January 2006, that

action is pending; the parties have just completed the early phases of discovery. Because the landlord cleaned up the property, no lead hazards remained to be addressed, so that issue is not part of the complaint.⁵³

Why Use Citizen Suits?

To the advocate or attorney assisting low-income residents, the Resource Conservation and Recovery Act's citizen suit authority has significant advantages over traditional legal bases for compelling cleanup of identified lead hazards.⁵⁴ Most important, the notice of intent to sue may achieve the desired results without incurring the costs and burden of filing a complaint.⁵⁵ As I found in the Indiana case, the notice can bring about immediate action by a recalcitrant property owner. The property owner has several reasons to cooperate when receiving the notice:

- The EPA's administrator and state hazardous waste authority are notified of the problem. Most property owners would prefer to be out of the spotlight of these agencies.

⁴⁴Letter from Enrico Garcia, Vigo County Health Commissioner, Vigo County Health Department, to William Kassis [landlord] (Sept. 29, 2004) (enclosing, among other reports, Sarah Reed, Vigo County Health Department, Lead-Based Paint Risk Assessment (2004)). The highest level was 254 µg/ft.² in the floor of the kitchen; this level was six times the EPA standard of 40 µg/ft.² in 40 C.F.R. § 745.65.

⁴⁵Letter from Thomas G. Neltner, Attorney for Katrina Snow [tenant], to William Kassis and Sandra Kassis [landlords] (Jan. 24, 2005) (regarding Ninety-Day Notice of Intent to File Citizen Suit for Imminent and Substantial Endangerment to Children), available at www.ikecoalition.org/DOCUMENTS/SNOW_RCRA_NOTICE_1-24-05.PDF.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* Although the mother and child had moved, they still lived in the neighborhood, and the child still was at risk of exposure to the lead hazards.

⁴⁹Telephone call to Thomas G. Neltner, Attorney for Katrina Snow [tenant], from William Kassis [landlord] (Jan. 26, 2005).

⁵⁰Indiana Lead Abatement Activities Notification Form submitted by William Kassis [landlord] to Office of Air Quality, Indiana Department of Environmental Management (May 4, 2005) (on file with Thomas G. Neltner).

⁵¹326 IND. ADMIN. CODE 23-4-5 (2005), available at www.in.gov/legislative/iac/T03260/A00230.PDF; see also *id.* 23-1-2 (defining abatement). Indiana's requirements are the same as the federal requirements in 40 C.F.R. pt. 745, subpt. L.

⁵²Boykin & Boykin v. Kassis & Kassis, No. 77D01-0505-CT-00149 (Ind. Super. Ct. filed May 12, 2005).

⁵³Indiana Lead Abatement Activities Notification Form, *supra* note 50.

⁵⁴The key to any such case is obtaining sampling data that demonstrate the existence of the lead-dust hazards as defined by 40 C.F.R. § 745.65. Without these data, there is no basis to file the notice. Fortunately, having a dust wipe sample analyzed by an approved laboratory costs only \$10 to \$15. The Community Environmental Health Resource Center, operated by the Alliance for Healthy Homes, has developed standard protocols and methods to help community groups and citizens conduct these tests. See Community Environmental Health Resource Center, Lead Dust Decision Guide, www.cehrc.org/tools/lead/leaddust/decisionguide.cfm (last visited Jan. 25, 2006); see also Alliance for Healthy Homes' web site, www.afhh.org.

⁵⁵I encourage readers to send me any examples they find of the persons issuing notices of intent to sue under Section 7003 authority to clean up lead hazards, especially in a residential setting.

- The word “waste” can attach to the property a stigma that is impossible to achieve with a term such as “deteriorated paint.” The word “waste” has the potential to transform the discussion from property owners’ failure to maintain their property to the owners’ decision to allow children to be exposed to a solid waste in the form of lead dust that poses an imminent and substantial endangerment.
- The notice can trigger requirements that property owners notify their insurance company. In my experience, the objective judgment of the insurance attorney overrides the property owner’s claim that the problem is “just” deteriorated paint. Whether the insurance covers the claim or not, this objective judgment encourages the property owner to act.
- The cost to abate the lead hazards is far less than the cost of litigation. The EPA’s draft economic analysis for its January 10, 2006, proposed rule makes it clear that the lead hazards can be eliminated with an investment of less than \$10,000 and ongoing proper maintenance.⁵⁶

Several other advantages of Resource Conservation and Recovery Act citizen suits for compelling cleanup of lead-dust hazards include the following:

- Any citizen may file the notice without an attorney.⁵⁷ Although advocates must be careful not to be perceived as “bluffing,” they should be able to obtain a landlord’s cooperation without a significant investment of limited legal resources.
- The media typically view the notice as equivalent to litigation. The advocate gets the leverage that the media spotlight affords while avoiding the costs and burdens of litigation.
- The notice may prompt intervention by the EPA or the state hazardous waste authority.

If the parties end up in court, the statute authorizes the court to award attorney and expert witness fees to the prevailing party.⁵⁸ This enticement may be enough to convince an attorney to take on a case.

Additional Points to Consider

Using Resource Conservation and Recovery Act citizen suits for compelling cleanup of lead dust hazard has its limitations:

- The two EPA actions discussed here involve lead dust levels well beyond the EPA’s definition of lead hazards in 40 C.F.R. § 745.65. A court may not be inclined to issue an order if the levels are close to the EPA standards.
- The property owner might blame the tenant for the presence of the solid waste. A tenant who has disturbed the paint may be considered a person also responsible for the endangerment and ordered along with the property owner to clean up the lead dust. Thus using the citizen suit approach is best where a property owner has failed to do proper maintenance (such as not painting regularly) or has used dangerous work practices (such as dry sanding, sand-blasting, or burning).
- The property owner might retaliate against the tenant. Even where retaliation is illegal, it is difficult to prove. Thus, to force the landlord to act, the advocate may want to use a coalition of tenants or a community-based group whose members include the tenants.
- The property owner may close the building and avoid having to clean up the property by eliminating all tenants. While excluding tenants with children is against federal law, closing the building is not.⁵⁹ A court may order the property owner to keep the building closed to protect children from its dangers.

⁵⁶U.S. ENVIRONMENTAL PROTECTION AGENCY, DOC. NO. EPA-HQ-OPPT-2005-0049-0086, DRAFT ECONOMIC ANALYSIS OF TOXIC SUBSTANCES CONTROL ACT SECTION 403: LEAD-BASED PAINT HAZARD STANDARDS 5-12 Exhibit 5-3 (2005). See sidebar for a discussion of the proposed rule.

⁵⁷The notice is not filed with a court. For an example of a letter giving notice to a landlord, see Neltner, *supra* note 45.

⁵⁸Resource Conservation and Recovery Act of 1976 § 7002(e), 42 U.S.C. § 6972(e) (2005).

⁵⁹Fair Housing Act of 1988 § 804, 42 U.S.C. § 3604 (2005) (prohibiting discrimination based on familial status). For more information, see U.S. Department of Housing and Urban Development, Fair Housing Laws and Presidential Executive Orders, www.hud.gov/offices/fheo/FHLaws/index.cfm (last updated Sept. 28, 2004).



January Jones

Teeth marks line a window. Although eating lead chips is often blamed for childhood lead poisoning, most lead-poisoning cases are due to dust.

■ ■ ■

Overall the advantages of the Resource Conservation and Recovery Act citizen suit significantly outweigh the disadvantages for the advocate or attorney seeking to force a cleanup when the federal, state, and local agencies are unwilling or unable to act. The notice represents a clear demand for the property manager to act. It is relatively easy to file and may result in immediate cleanup—much faster than cajoling government agencies to act or beginning time-consuming litigation. If

litigation is needed, the EPA's precedents that lead hazards pose an imminent and substantial endangerment to children's health should make success more likely.

Author's Acknowledgments

I worked on the Terre Haute action discussed in this article while executive director of Improving Kids Environment (www.ike-coalition.org). The Alliance for Healthy Homes (www.afhh.org) funded part of my work.