

**Risk Management and Insurance Considerations for
HUD's Office of Healthy Homes and Lead Hazard Control Grantee Programs**

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State and local recipients of HUD Lead Hazard Control grants and Healthy Homes demonstration grants, and those other public and private entities that will perform work under the grants or benefit from the grant funding, all potentially face exposure to liability arising out of their respective activities and responsibilities. Therefore, this guidance document will identify and provide possible options to address these liability exposure sources, including the creation of a risk management plan and the use of liability insurance.

Activities and Responsibilities That Give Rise to Potential Liability

HUD Lead Hazard Control grantees are focused on evaluating and controlling residential lead-based paint hazards. HUD Healthy Homes demonstration grantees, in addition to addressing lead hazards, may also focus on one or more of the following health and safety hazards: moisture/mold/mildew, pests (e.g., cockroaches, dust mites), vermin (e.g., rodent infestation), radon, pesticides, carbon monoxide and slip/trip/fall hazards. By virtue of their work to evaluate and control all such hazards, grantees and their sub-grantees, contractors and subcontractors may face allegations, whether merited or not, that their activities caused bodily harm or property damage to third parties. The activities and program responsibilities that give rise to potential liability include:

- Lead paint risk assessments;
- Lead paint inspections;
- Indoor air quality evaluations;
- Mold assessments;
- Residential environmental health and safety hazard assessments;
- Clearance examinations;
- Lead-based paint abatement and/or interim controls;
- Residential environmental health and safety mitigation;
- Work specification and scope of work development;
- Construction oversight and project supervision;
- Program Management;
- Temporary relocation; and
- Rehabilitation, renovation and remodeling.

Although procedures and standards for evaluating and controlling lead-based paint hazards are well established, there is less certainty with respect to other residential environmental health

hazards, including mold and mildew. Grantee programs that are addressing multiple hazards often have limited guidance on how to be reasonably certain that treated units are clean and safe for re-occupancy. The lack of clear standards, guidelines, testing methods and controls for other hazards besides lead potentially creates additional liability exposure for grantees because the means for protecting others against harm is not as well understood or established.

Legal Duties Owed to Third Parties and Potential Imposition of Liability

In our society, it is a well-established legal principle that people, whether individually or as corporate entities, must not physically injure others or damage or destroy their property, either accidentally or intentionally. Therefore, the statutory, administrative and common law requirements to prevent such bodily injury or property damage apply to HUD grantees and other parties performing work as part of the grant. Each of these sources of civil legal liability establishes the standards of safety against which such entities will be held legally accountable. The legal requirements translate into the following legal duties or legally protected rights owed to third parties: the duty of reasonable care; the duty to warn; the duty to test; and the duty to be informed.

The *duty of reasonable care* requires that third parties must be protected from reasonably foreseeable harm arising out of conduct or activities that could result in injury or property damage. An example of how grantees might meet this standard is by temporarily relocating occupants and restricting access to a property during construction activities so as to avoid exposure to lead dust and debris. The *duty to warn* requires that third parties be advised of inherent dangers or risks to which they could be exposed arising out of one's conduct or activities that could result in injury or property damage. Grantees might satisfy this standard by posting warning signs outside work areas and/or obtaining signed consent from occupants to remain out of the work area to avoid exposures. The *duty to test* requires that one evaluate and ascertain whether there are any potential dangers or risks to which third parties could be exposed arising out of one's conduct or activities that could result in injury or property damage. This standard would be met by grantees when a clearance examination is performed and occupants are not permitted to return to the property until the results of the dust wipe sampling indicate that dust lead levels are below the EPA clearance standards. The *duty to be informed* requires that one become knowledgeable about the latest methods, advances, scientific findings, discoveries, guidance or regulations to the extent that this knowledge would shield third parties from potential dangers or risks arising out of one's conduct or activities. Grantees might satisfy this standard by requiring that all contractors' workers have at least taken the one-day lead-safe work practices training.

If one or more of these duties are breached (i.e., not met) and a third party is injured or suffers property damage as a result, then an individual or corporate entity, including a grantee, could be found liable for monetary damages or some other form of compensation by imposition of the following legal remedies: negligence; breach of contract; breach or express or implied warranty; strict or absolute liability; and negligence per se.

Negligence can be found if it is proven that one or more legal duties were owed, the legal duty or duties were breached, and the failure to meet the legal duty/duties was the proximate cause of some incident or accident, which resulted in damages for injury or property damage as a direct

consequence. *Breach of contract* can be found when one fails to perform to the terms of a contract and this results in compensable injury or property damage. *Breach of express or implied warranty* can be imposed when express or implied warranties of safety and suitability have not been met and result in compensable injury or property damage. *Strict liability or absolute liability* can be found without evidence of fault or wrongdoing when one engages in inherently dangerous activities or conduct that is likely to expose third parties to harm that results in compensable injury or property damage. *Negligence per se* can be found if there is a violation of some provision or provisions in a statute, ordinance or regulation and there is resultant compensable injury or property damage.

Designing a Risk Management Plan

Fortunately, there have been no known lead-related lawsuits or claims arising out of the activities of any HUD Lead Hazard Control grantees. This is likely a result of the inherent safeguards built into lead hazard evaluation and control work. Yet it is essential that all Lead Hazard Control and Healthy Homes demonstration grantee programs take steps to address potential liability and loss exposures. One potential means of doing so is to adopt a risk management plan. *Risk management* can be defined as the process of identifying, analyzing and treating exposures to liability and loss. Grantees should work with an insurance broker, a professional risk manager, an attorney or all three to craft a realistic risk management plan to guide the program.

There are essentially five risk management techniques that can be employed: avoidance; loss control; non-insurance transfer; self-insurance and retention; and insurance.

Avoidance means that an entity never acquires an exposure to liability or loss because it does not engage in an activity or activities that would give rise to the exposures in the first place. An example of avoidance would be a grantee's decision not to perform risk assessments itself but to subcontract this work out to a consultant. *Loss control* includes steps to change liability and loss exposures by either minimizing the frequency of the occurrence of peril or risk (i.e., loss prevention) or minimizing the adverse financial impact of such occurrences (i.e., loss reduction). Examples of loss prevention and loss reduction are provided below. *Non-insurance transfer* includes the legal transfer to another entity of all elements of a specific liability or loss exposure, including the potential financial impact that may arise out of that other entity's activities or responsibilities on one's behalf. An example of non-insurance transfer is when a grantee requires contractors and subcontractors to contractually "hold harmless, defend and indemnify" the grant program agency for any liability it has resulting from the contractor or subcontractor's activities/operations on its behalf. *Self-insurance and retention* is when an entity knowingly retains and bears the financial consequences of liability and loss. Because some types of liability insurance have deductibles and "self-insured retentions," those grantees that choose to purchase such insurance will often, by necessity, be self-insuring or retaining a portion of any losses they may have. Finally, *insurance* is a financial mechanism that enables an entity to transfer the financial consequences of liability and loss to an insurer in exchange for the payment of premium. Insurance, as a risk management tool, is intended to reduce financial uncertainties and promote predictability relating to liability and loss. A more comprehensive discussion and description of special environmental liability insurance are provided below.

Loss Control Steps and Options to Eliminate or Minimize Liability and Loss Exposures

Besides insurance, there are a variety of loss prevention and loss reduction steps and options that grantees can employ to eliminate or minimize liability and loss exposures. These include the following examples:

1. Create *Standard operating procedures* to guide the program.
2. Develop good *quality assurance and quality control* protocols for handling samples and collecting and recording key data.
3. Work with attorneys to craft tight, concise *standard contract documents*.
4. Establish a *well-defined construction strategy and work specifications*.
5. Establish an *archiving and record keeping system*, to include a secure file and record storage room and locked cabinets, and maintain detailed case and project records for an indefinite time period.
6. Make sure that *critical staff members have the necessary training and experience* for their given responsibilities.
7. Carefully pre-qualify and hire contractors and subcontractors that have *trained and certified or lead-safe work practices trained employees and work crews*.
8. *Identify and either eliminate or control all lead hazards*.
9. *Perform a physical audit and photograph and/or videotape* the exterior and interior of the building, including any occupant belongings remaining outside or inside, before work begins.
10. *Relocate building occupants* or make provisions for occupants to remain out of the building and for their belongings to be covered and protected while the work is proceeding.
11. *Closely monitor and supervise contractors and subcontractors* during the construction phase.
12. *Carefully secure and lock all housing units during construction* to prevent theft, vandalism and other damage.
13. *Obtain complete signed, informed consent* from property owners and/or occupants, including a full acknowledgement of the nature of the work, the hazards that will be eliminated or mitigated, the need for ongoing monitoring and maintenance (if any), the obligation to report the results of any lead testing to future prospective buyers or tenants of the property, the procedures for reporting a grievance to the program and the receipt of the EPA pamphlet "Protect Your Family From Lead in Your Home."
14. *Keep abreast of new regulations, requirements, research and the state-of-the-art* to the extent these will necessitate a modification of the program's activities.

Liability Insurance Issues

A complete risk management plan will, by necessity, include some provision for liability insurance. However, with respect to liability and loss exposures arising out of lead hazard control and mitigation of other residential environmental health and safety exposures, the typical general liability policy excludes such exposures from coverage. Within such policies are so-called absolute pollution and contamination exclusions and some policies contain even more specific exclusions, including those written for lead, lead-based paint and lead-based paint hazards. Fortunately, there are special environmental liability insurance policies for these types of exposures and operations. But limited availability, cost, stringent application and underwriting requirements, and restrictive or narrow coverage terms and conditions make such policies somewhat problematic. Key issues and questions each grantee will face include:

- Should the grant recipient agency acquire this special insurance for itself?
- Should the grantee require that sub-grantees, contractors and subcontractors obtain this insurance for themselves as a condition to working in the grant program?
- Would failure of the grantee and other parties to obtain this insurance potentially shut down the program?
- Does the grantee have a tolerance for some level of risk? If so, is it willing to self-insure all or a major portion of the exposure?

The question of whether to acquire and/or require special environmental liability insurance will be an important decision for grantee programs. On the one hand, having the coverage provides some measure of assurance that the program will be protected and defended by the insurer even for lawsuits and claims that have no merit and are ultimately dismissed or closed without settlement. The potential defense exposure, that is the cost of investigating and defending a lawsuit, is most frequently the greatest single justification for purchasing liability insurance. On the other hand, not acquiring or requiring this special insurance may reduce the program's cost of doing business since any sub-grantees, contractors and subcontractors will not have to purchase it and ultimately pass on the cost to the program. Also, by not mandating the coverage, additional contractors and subcontractors that would not otherwise qualify for work in the program will be available. A larger pool of firms can reduce unit and aggregate construction costs due to competition for the work.

One final consideration for deciding whether special environmental liability insurance is necessary, particularly for Lead Hazard Control grantees, is the lack of evidence of any known lead litigation arising out of specific grant program activities over the course of 11 years of HUD grant funding. The very nature of the work and HUD's requirements for lead paint risk assessments, lead paint testing or full lead paint inspections, and clearance examinations provides a build-measure of protection since families will not be able to reoccupy homes until all lead hazards have been identified and addressed either by abatement or interim controls or a combination of both. Although not entirely risk free, the work is intended to evaluate, reduce or eliminate lead hazards and requires various lead-safety procedures. Healthy Homes demonstration grantees may not have the same level of assurance due to the limited standards and guidance for other health and safety hazards.

Liability Insurance Resources, Policies and Coverage Considerations

The aforementioned special environmental liability insurance policies are available through a small number of insurers functioning in the niche environmental liability insurance marketplace. As of this writing, there are approximately 15 such insurers offering some form of environmental liability coverage and less than 10 are offering lead-specific liability coverage. These insurers, as distinguished from insurance brokers or “managing general agents/underwriters,” range from being multi-billion dollar corporations with significant capital and surplus to smaller, more modestly capitalized companies. The significance is that there is some measure of financial stability with a large, well-established insurer, which translates into security that the company will be able to pay for losses, if any, in the future.

There are several insurance policy forms that provide different types of coverage for different insured activities and operations. In the context of lead hazard evaluation and control and residential environmental health and safety mitigation, these include: Contractor’s Pollution Liability; Pollution Legal Liability; Professional Liability Errors and Omissions; and a combination of Pollution Legal Liability and Errors and Omissions Liability.

Contractor’s Pollution Liability policies are intended to provide coverage for the firms actually engaged in abatement or mitigation activities. The policies eliminate the pollution exclusion or modify the exclusion so that it will not bar coverage for losses arising out of the pollutant or contaminant that the contractor is engaged in abating or mitigating, such as lead. Some Contractor’s Pollution Liability policies also include basic Commercial General Liability coverage, thereby eliminating the need to purchase this coverage separately.

Pollution Legal Liability policies cover incidental exposures to pollutants or contaminants that arise out of normal business operations or activities. For example, a Pollution Legal Liability policy might be suitable for renovation and remodeling contractors that are not engaged in mitigating or remediating hazards but might accidentally disturb or come into contact with such hazards and face a lawsuit or claim as a result. Again, these policies have the so-called pollution exclusion modified so as not to limit coverage for certain pollution or contamination events.

Professional Liability Errors and Omissions policies are written for individuals and firms engaged in performing inspections, risk assessments, design development and other “professional services.” The policies cover acts, errors or omissions in rendering or failing to render such services. For those engaged in lead or other environmental projects, the policies are also written so that the so-called pollution exclusion will not bar coverage.

Combined Pollution Legal Liability and Errors and Omissions Liability policies are intended for firms that may perform inspection services and also conduct operations relating to mitigation or remediation of hazards.

In the past, a handful of insurers have been willing to write program-type policies in which the grantee was the primary named insured and all sub-grantees, contractors and subcontractors could be added to the policy, when needed, as additional named insureds for work performed under and funded by the grant program. These policies were to some degree manuscripts and tailored to the individual program’s needs. Coverage for Contractor’s Pollution Liability and

Errors and Omissions Liability could be written into the policy. Unfortunately, the insurers' willingness to consider and provide this program-type coverage has waned in recent years.

Questions grantees should consider about these various policies include whether the policy form is written on an "occurrence" or on a "claims made" basis, what the minimum premium will be for the policy, what limits or liability are available, what type of policy deductible or self-insured retention is built into the policy, and whether defense costs reduce the available limits of liability.

"Occurrence" policies require that there be bodily injury or property damage caused by an "occurrence," typically "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," that takes place during the policy period. "Claims made" policies, on the other hand, require that any bodily injury or property damage must have been caused by a covered event that not only takes place during the policy period or after a "retroactive date" but also results in a claim first made against the insured and reported to the insurer during the policy period. Therefore, "occurrence" insurance generally provides coverage indefinitely so long as the covered claim arises out of an "occurrence," which took place during the policy period. "Claims made" policies, in contrast, are much more limited in terms of when claims may be covered. It is worth noting that Errors and Omissions Liability policies are almost always written on a "claims made" basis.

Minimum policy premiums will vary based on the policy type. Contractor's Pollution Liability policies may have minimum premiums as low as \$5,000 per year and Pollution Legal Liability and Errors and Omissions Liability policies may have minimum premiums as low as \$2,500 per year. However, depending upon the estimated revenues of the applicant, which is the basis for the premium rate calculation, actual policy premiums could be much higher.

Available policy limits also vary by policy type. Generally, however, it is recommended that any policy carry at least a \$1 million per occurrence or per claim limit with at least a \$1 million policy aggregate limit. Grantees may require a higher policy aggregate depending on the size of the grant and anticipated work.

Most so-called environmental liability policies will have some type of deductible or even a self-insured retention. With deductibles, the insured may have to pay for some portion of a covered claim out of its own pocket or reimburse the insurer for claim payments made on its behalf. However, the insurer will still be responsible for investigating the claim or lawsuit and defending the insured from dollar one. Deductible amounts vary, with a minimum of \$2,500 per claim or per occurrence being typical. With self-insured retentions, the insured may be responsible for its own defense and investigation until or unless the potential claim exposure is expected to or has actually exceeded the retention limit. In such cases, the insured becomes responsible for investigation and defense costs up to the retention limit and for payment of any claims within the retention limit. Retention limits also vary similar to deductibles although the level may be much higher and not less than \$7,500.

Another unique characteristic of environmental liability policies is that any defense costs, which would include the cost of investigation and litigation, will typically reduce the available policy limits.

Insurance policies are rather complex contract documents, which must be carefully read to understand the plain meaning of the terms, conditions, definitions and exclusions. These contractual provisions will affect how the coverage is conveyed in the policy form and whether there will be any gaps or limitations. For that reason, grantees should consult with a knowledgeable insurance broker, a professional risk manager, an attorney or all of the above to review the policy or policies under consideration before making any decisions.