

Legal Opinion: GCH-0006

Index: 2.100, 2.200
Subject: Lead-Based Paint

October 28, 1991

NOTE TO: BILL FLOOD

FROM: MIKE REARDON

SUBJECT: TALKING HEADS VIDEO, LEAD-BASED PAINT, Q & A

As requested, here are our responses to the questions marked on the attached list:

PROGRAM POLICY

1. QUESTION: Since the LBP Guidelines are not mandatory, are the two certification contained in Appendix 14 of the Guidelines mandatory? If so, what is the regulatory citation for the requirement? What sanctions are to be imposed if the certification are not made by PHAs?

ANSWER: Certifications regarding testing and abatement are required by the Lead-Based Paint Poisoning Prevention Act (LBPPPA) and regulations. See 42 U.S.C. 4822 (c) and (d); 24 CFR § 964.706(c) and (d)(2) and 968.110(k). The certification forms at Appendix 14.4 of the Guidelines are suggested formats for the testing and abatement certification. HUD may impose any sanction available under the ACC or State law if the PHA fails to provide the necessary certification. Since comprehensive modernization is involved, HUD may first withhold any CIAP disbursements until the certifications are provided.

5. QUESTION: Should a PHA procure liability insurance coverage for dwelling units that were tested and/or abated prior to the issuance of the Master Policy?

ANSWER: PHAs are required to maintain comprehensive general liability insurance for their projects. PHAs should consider additional coverage for previous LBP testing and abatement work because of the possibly of pollution exclusion coverage under their general liability policy. Courts are divided on interpretation of these policies. Additional insurance would be an eligible expense for operating subsidy.

6. QUESTION: Is the Department planning to issue a new LBP regulation which integrates all of the requirements? If so, when?

ANSWER: Yes. The Department is currently drafting such a regulation for the Public and Indian Housing programs and other HUD programs covered by the LBPPPA. A proposed rule should be published early next year.

7. QUESTION: What are the LBP requirements for PHA owned Section 8 units?

ANSWER: The Housing Quality Standards for the Section 8 Housing Assistance Payments Program - Existing Housing provide LBP requirements at 24 CFR § 882.109(i). This information could be presented in a chart. Showing for example, defective paint, chewable surfaces, testing, abatement, tenant protection, yearly review and records requirements. It should be emphasized that these requirements do not reflect the recent amendments made to the LBPPPA and further rulemaking is developing.

8. QUESTION: Since elderly hi-rise buildings have started to house more and more mentally and physically disabled younger residents who may have small children, or are not mentally able to know to not to digest paint, will LBP regulations now be applied to "elderly" hi-rise?

ANSWER: The LBPPPA exempts housing for the elderly or handicapped, except for any dwelling in such housing in which any child who is less than 7 years of age resides or is expected to reside. See 42 U.S.C. 4822 (e). PHAs are responsible to develop occupancy criteria following the United States Housing Act of 1937 and regulations. PHAs are also responsible to take appropriate LBP action based on the occupancy of their "elderly" projects. HUD will be addressing this issue in the revised LBP regulations.

14. QUESTION: Is the PHA required to test a random sample of units in a development that has completed comprehensive modernization?

ANSWER: Yes, unless records establish that such units, PHA owned or operated child care facilities, exterior or interior common areas were tested or treated in accordance with the standards prescribed in subpart H, Part 965. See 24 CFR § 965.709.

15. QUESTION: What is the penalty if a PHA/IHA does not complete testing by 1994?

ANSWER: HUD may impose any sanction available under the ACC or State law if the PHA fails to perform the necessary testing. Since comprehensive modernization is involved, HUD may first withhold any CIAP disbursements until the testing is completed.

17. QUESTION: If a housing unit has been transferred to the buyer and later found to have LBP, is HUD still legally responsible for abatement?

ANSWER: HUD is not responsible for abatement unless HUD had knowledge of LBP on the unit and failed to disclose the condition to the buyer.

18. QUESTION: If a housing unit is tested and found to have LBP, but is subsequently transferred to the buyer prior to any work being done, is HUD still legally responsible to pay for abatement?

ANSWER: HUD is only responsible for informing the buyer of known defects. In the homeownership programs, the PHA should ensure that such abatement work is completed with available HUD assistance before transfer of title (i.e., CIAP (emergency, lead-based paint or special purpose modernization), Comprehensive Grant Program or operating subsidies).