**PROPOSED REGULATIONS OF THE DEPARTMENT OF LABOR STANDARDS**

**DELEADING AND LEAD-SAFE RENOVATION REGULATIONS**

**Modification of 454 CMR 22.00, et seq.**

## RESPONSE TO PUBLIC COMMENTS

### 22.01 Authority, Purpose and Scope

- What is the timeline with which DLS has to issue a response to the request for an alternate work method?

DLS has not included a timeline for requests of alternate work methods as there may be many variables regarding a request. It is anticipated that very simple, "unique job" requests may be quickly reviewed within 24-hours, and larger, more complex requests may require a longer review period. DLS understands that timeliness is an issue and will endeavor to accommodate requests expeditiously. DLS has a track history of timely response to allowances for its regulations.

- Will DLS publish alternate work practices, including clarity as to what that alternate method is?

Yes. It is the intent of DLS to publish on its website the practices that are approved to encourage use of compliant techniques and to better inform the regulated community and the consumer of cost saving, protective options.

### 22.02 Definitions

- "Dangerous Level Of Lead" definition should be consistent with CLPPP definition.

DPH/CLPPP has defined this term. DLS references CLPPP's definition and is not aware of any inconsistency.

<u>Comments relating to "Minor Repair and Maintenance Activities"</u>

- Concern about the extension of minor repair and maintenance to be included in the regulation. State has not provided adequate funding to enforce what currently exists, why is it adding to the depth of the regulations?

- Minor Repair and Maintenance Activities definition – Lead painted surfaces vs. painted surfaces. Does DLS intend to regulate all painted projects? Or should the word "lead" in "lead-painted surfaces" be stricken?

The word "lead" should indeed be stricken from any phrase that reads "lead painted surface(s)," unless it involves Class I Deleading, Moderate Risk Deleading, or Low Risk Deleading Work. This has been corrected in the current draft.

- Minor Repair and Maintenance Activities definition – Reference for prohibited work practices. Current regulation would be 22.11(9)(a). Proposed regulation would be 22.11(1)(i)1?

Yes.

- With the way the regulation is now written, it appears there is no de minimus project or disturbed surface under MA law. So all contractors, on every pre-78 property, are required to follow RRP work practices. Every plumber, every electrician has to follow RRP practices.

DLS appreciates the comments received on this point and has debated the issues regarding the enforcement of Lead-safe Renovation requirements for de minimus work. DLS has decided to remove the restriction in the draft amendments and make no change to the regulation on this point. Though DLS will not be requiring the same training, licensure and work practice requirements for work less than the threshold levels, DLS continues to encourage lead safe work practices to be utilized by all who work with painted surfaces as a best practice regardless of regulation.

<u>Comments relating to "Owner's Agent" definition</u>
"Owner's Agent" definition references only low risk deleading options. However, as a licensed lead inspector, there is an option for low risk and owners for moderate risk deleading. Was Moderate Risk intentionally left out? 105 CMR 460.175 includes Moderate Risk by definition.

DLS's definitions work in tandem with the DPH/CLPPP regulations for the purposes of Deleading. DPH/CLPPP allows owners and their agents to perform Moderate Risk and Low Risk Deleading work if they received the appropriate Owners/Owner's Agent training and CLPPP authorization number. Similarly, DLS allows Moderate Risk work to be performed by Deleading Contractors and Lead-safe Renovation Contractors if they have taken the training prescribed in DLS' regulations and have been issued the appropriate license and authorization number.

If a property owner is seeking a Letter of Compliance or a Letter of Restored Compliance, the property owner must complete the appropriate training if they are doing the work themselves, or hire a licensed Deleading or Lead-safe Renovation Contractor for the work to be done.

In the matter of addressing property owners who are not seeking a Letter of Compliance with the Mass Lead Law but are renovating or painting a pre-1978 property where the EPA's Renovation, Repair and Painting (RRP) Rule would be applicable, DLS was authorized by EPA in 2010 to administer its own version of RRP in 454 CMR 22.00, Deleading and Lead-safe Renovation Regulations, and property owners must be properly trained and licensed if they are performing regulated renovation work.

<u>Comments relating to "Painted Surface" definition</u>
- Concerned about the definition of "all painted surfaces" when using a torching method on a non-Lead-Safe covered project. Can DLS clarify that there are limits to these methods when we're only talking about them within the context of the LSR regulation? It seems like DLS is referring to painting and renovation work even on projects for homes built after 1978.

It is not the intent of DLS to further regulate properties not subject to the regulation. As a caveat, DLS would discourage the use of torching paint (lead based or not) as a renovation technique.

Comments relating to "Renovation" definition

- Broadening the term "renovation" to include minor isolated repairs goes against the EPA preamble which limits these jobs to mean renovations of pre-1978 housing or child-occupied facilities.
- How does anyone know the difference between a renovation and a renovation under these regulations? The word "renovation" in the dictionary does not include the MA definition.
- What is a renovation when dealing with lead versus a regular renovation? Clarity is needed.

The terms are defined in the Definitions section of the Regulations to clarify the intent and scope.

- Please add "Tarpaulin" to the definition section of the law – if this is to mean canvas then state so.

Because of an earlier Public Hearing commenter's concerns about overuse of plastic sheeting outdoors, DLS considered alternatives to plastic sheeting and made the allowance for the use of tarpaulins or other appropriate impermeable material. DLS recognized that tarps can be manufactured of material other than canvas, and only requires that whatever is used extends ten feet from the surfaces undergoing renovation, or a sufficient distance to collect any and all falling paint debris, whichever is greater, and not be used for Interior Renovation Work.

**22.03 General Requirements**

- 22.03(3)(a). A person receiving a waiver through EPA is required to follow responsibilities of contractor and supervisor. Both regulations for sections (a) and (b) should have same reference number.

This correction has been made; both sections should reference 22.11(1)(c) and (d).

- Worker Protection. If someone can prove by personal air sampling results that workers are exposed to dust levels below OSHA AL (30 ug/m3), then how would one go about legally not wearing suits on their sites if such use of mechanical engineering systems such as Festool dust extractors and/or negative air machines? Will MA accept data base created by such firms lab samples using OSHA's protocol?

DLS appropriately respects competent jurisdiction with regard to worker protection. It is not DLS's intent to require additional levels of protection where it is not beneficial or health protective. DLS will accept appropriately performed Negative Exposure Data (NAD) that has been accepted by the competent jurisdiction (OSHA).

**22.04 Licensing Procedures for Deleading Contractors and Lead-Safe Renovation Contractors**

- What is the requirement for the state to notify LSRC, certified renovators, and LSRS that they need to renew? Should this be part of the regulations?

There is no requirement for DLS to notify individuals or businesses of their legal requirements for training and licensure under this regulation. DLS believes that timely renewal is a normal part of business and that individuals performing under the auspices of the regulation will be familiar with their training and license expiration dates.

- 22.04(1)(a)5 – How does one get all these certificates? Is this a single document filing all of these items or are these in 5-6 separate documents?

This section refers to the "certification of compliance" as part of DLS's application for licensure as a Deleading Contractor or a Lead-Safe Renovation Contractor. The applicant is certifying that all laws of the Commonwealth shall be complied with.

- 22.04(1)(a)10, last part of this states medical monitoring but then points to the respirator standard 1910.134 – is DLS referring to 1926.62 when talking about medical monitoring?

Yes.

**22.07 Licensing and Administrative Requirements for Providers for Deleading and Lead-Safe Renovation Training**

- 22.07(6), Online notifications for abatement suggests inspectors would have to confirm that there is an online notification before issuance of LOC.

DLS does not have regulatory authority over DPH/CLPPP licensed Lead Inspectors or the requirements for issuing a Letter of Compliance. DLS does understand these concerns, and will share this comment with CLPPP.

**22.08 Training Requirements**

- There has been some opposition to electronic training. Public comments have noted that adults learn better when there is participation and interaction with other people. There have been allegations of a person's wife or kids or someone else doing the online training for them. There is no good way to verify the person taking the course is the person being trained. If we are going to move in this direction, suggest delay in implementation period of e-learning to discuss this with training providers regarding how to verify trainee.

DLS has allowed the option of electronic training in order to be consistent with the EPA's RRP program with which we are reciprocal. DLS agrees that quality training is a threshold for compliance and encourages training providers to continue to provide excellent training to adult learners. While DLS understands the concern for electronic training, we want the option to be available to a broad audience.

- Has the state considered additional paint chip sampling as it relates to training time, ie extending the training time? Demonstration of paint chip sampling will add 30-45 minutes.

DLS is aware of the EPA allowance for paint chip sampling. While DLS views appropriately taken paint chip sampling to be of limited value to an informed contractor, DLS does not wish to prohibit an allowance granted to contractors by the EPA. DLS agrees that adding this element into the 8 hour model creates a difficult training paradigm.

- Why doesn't the regulation require that MA produce a training manual for MA? The EPA manual should be forbidden in MA.
- Having a MA-specific training provider manual would cause training providers that train in other states to have to run state-specific courses and would require them to do more work. It would create a burden for training providers.

While DLS is sympathetic to "multi state" trainers, DLS remains emphatic that training in Massachusetts be specific to the state. Those who are working in Massachusetts should understand DLS's regulations.

DLS believes that the differences between the EPA – RRP requirements and that of DLS are significant and that DLS is justified in requiring training providers to incorporate the terminology and work practice differences outlined in the DLS-LSR regulations into their courses and manuals. To allow the use of EPA terminology in LSR Supervisor courses taught in Massachusetts only perpetuates the confusion between EPA and DLS requirements.
In 2010, DLS believed that a previously trained workforce (deleader workers and supervisors) might be appropriately expanded to include renovation. The training provider community pointed out that this was problematic, as it would create a lot of confusion over what was allowed for deleading work, and what was allowed as renovation work. As a result, DLS will require separate training courses if a person wants to become a deleader-supervisor or a LSR supervisor.

- Training time is woefully insufficient in order to train people responsibly. ½ day training renewal does not work.

DLS acknowledges that the topics required to be covered in the 8-hour LSR supervisor course are challenging, but we must balance the need for training with the practical ability of businesses to comply with the law.

- It is explicit in the regulations that when non-licensed people are being trained, that it be in the language and manner in which the workers can understand. This is an OSHA requirement for whatever training is being given.

This is correct. DLS would expect that training be consistent with OSHA.

- The ratio of students to trainer at the times of hands-on activities is spelled out as 10:1. However, there is no number addressing class capacity overall.

This is correct and consistent with EPA. DLS does not limit the size of the classroom portion of the training, only the "Hands-on" portion, which is restricted to ten students per one instructor.

**22.09 Worker Protection and Medical Monitoring Requirements**

Comments regarding Medical Monitoring, 22.09(4)(d)4 and 22.09(4)(f)

- Object that a contractor can certify that they have a medical monitoring program. If they are in compliance with the Regulations and have a written program, there shouldn't be any problems to submit it. Suggest there is a checklist which includes all required parts of a written program, and require the contractor certify that they have this part in their plan. That way they are on notice that they must comply with ABCD and DLS does not have to review them.

Regardless of DLS's screening for written programs, these programs are a federal requirement of OSHA nationwide.

- Oppose medical monitoring self-certification because of the costs of executing and maintaining. Suggest doing a self-certification checklist admitting individual did a number of things pursuant to getting a medical monitoring program. Don't want to add costs to consumers. Those who follow Regs and play by the rules have higher costs and are losing jobs to guys who are "self-certified." Self-certification is easily abused.

DLS appreciates this comment. Operationally, DLS will develop a self-certification checklist.

- Medical monitoring requirements in RRP and deleading rules for contractors should be consistent. For example, OSHA rules are consistent and there is no difference in requirements.
- Does a physician now have to provide the medical report of the EE to the ER, who then has to give it to the EE? What about HIPAA rules?

Yes, in order to comply with DLS and OSHA's requirement, a Deleading Contractor, Lead-safe Renovation Contractor, or other employer, must obtain and furnish a copy of the written medical opinion from the physician to the applicant or employee within two working days of receipt of the opinion. The medical opinion contains information related only to the employee's fitness to perform job duties which concern potential exposure to lead; it does not include private medical information covered under HIPAA.

- Suggestion that the proposed language of the regulation under 22.09(4) be further amended to include physician assistants on the list of eligible medical examination, consultation, and "Reporting Physician's Statement" providers. The current language for medical examinations and consultations continues to be limited to physicians, excluding primary care providers, such as physician assistants.

DLS agrees with this comment that other licensed, healthcare professionals should be allowed to issue a "Physician's Statement". However, because DLS defers to the personal protection and

medical monitoring requirements as prescribed in the Safety and Health Regulations for Construction, 29 CFR 1926.62, DLS is unable to change this requirement.

**22.10 Notification Requirements for Deleading Projects**

- How do we know that notifications for deleading projects have been sent? If they haven't been sent, will this impact the owners negatively as far as getting Letters of Compliance? What are penalties for people not doing notifications?

If DLS is aware that notifications have not been sent, this is an enforceable action. DLS is currently working with DPH/CLPPP to develop an electronic filing system to better share Deleading notification information. As stated previously, CLPPP regulates the issuance of Letters of Compliance, and whether or not notification may affect the issuance of an LOC.

- Pages 12 section (8) and 34. If we are going to do online notifications, there should be a requirement after notification that an inspector receives a deleader's invoice from a deleader at the time of final reinspection.

This requirement already exists in the current regulations. See Declaration of Performance, 22.12(1)(f) and 22.12(2)(b)5.

**22.11 Work Practices and Other Requirements for Renovation Work and Minor Repair and Maintenance Projects**

- Open flame work prohibited from a painted surface, 22.11(2)(c)1. Why is the word lead not added to painted surface?

Addressed in earlier comments.

- 22.11(1)(a)2 – when testing for lead, must test every component affected. Shall we revisit this?

DLS requires that only the components that will be affected, or may be affected by the renovation work, must be tested for the presence of lead using a recognized test kit or assumed to contain lead paint. DLS does not believe that there is any reason to change this requirement.

- Clean-up Requirements 6.b states that the verticals are taken down after the workplace is thoroughly cleaned. Verticals hold large amounts of dust on their surface so the answer to vacuum them first doesn't work in the field. It is suggested that they are taken down after being sprayed with water just after picking up debris and before one begins the wash down phase of cleaning.

During renovation activities subject to Lead Safe Renovation, final cleaning verification occurs after all materials have been removed and the area is visually cleared and verified via cleaning verification card used by a trained supervisor.

- Supervisor Duties – 22.11(2) does not state where this training must be or cannot be held. I have been operating under verbal discussions that the training must take place before the worker arrives at the jobsite. Others suggest this worker training is held off-site. Please clarify.

DLS does not prescribe whether work training must be held before arriving at or at the work site. DLS only requires documentation of the training. DLS believes that this training can be conducted on-site as part of a walk through. The key concept is that the training is conducted and documented prior to an uncertified worker performing work on the jobsite. The EPA recommends that the STEPs manual be utilized for conduct of such training. DLS is preparing a powerpoint presentation that will be posted on our website that can aid Lead-safe Renovator supervisors in providing the required training to untrained workers. Check our website for the posting. DLS notes that OSHA also requires that a worker receive training before being exposed to a lead hazard.

### 22.12 Work Practices and Other Requirements for Deleading Projects

- Helpful to make sure requirements of DLS's Declaration of Performance is consistent with CLPPP's deleading invoice.

The requirements for each agency are essentially the same, listed below:

**DLS - Declaration of Performance**
Following satisfaction of the lead dust monitoring requirements of 105 CMR 460.170, the Licensed Deleader-supervisor who carried out the work shall submit a signed statement to the Inspector or Risk Assessor who performs the reinspection required by 105 CMR 460.760. Said signed statement, which shall include the Deleader-supervisor license number and its expiration date, the Deleading Contractor license number and its expiration date; or a licensed Lead-safe Renovation contractor and the Moderate Risk Authorization number of the person performing the Moderate Risk work; a description of the work performed and a statement that the work was performed in accordance with the applicable requirements of 454 CMR 22.00 and 105 CMR 460.000, shall be maintained as a record by the Deleading Contractor pursuant to 454 CMR 22.13(1)(e).

**CLPPP – Deleading Invoice**
Documentation of authorized abatement and containment work by an authorized person shall consist of an invoice, on a form approved by the Director, bearing the professional letterhead of a licensed deleader, or licensed lead-safe renovator with his or her license or certification number, and the Moderate Risk Authorization number of the person performing the Moderate Risk work including a signed statement that the authorized person has performed all work in compliance with 454 CMR 22.00 and 105 CMR 460.000. For authorized owner's and owner's agents, documentation of authorized abatement and containment work shall be made on a form approved by the Director.

### 22.13 Recordkeeping Requirements

<u>Comments relating to paint chip sampling</u>

- Paint chip sampling in the regulation—does this mean contractors can take the paint chip samples? The record-keeping section is the only section where the paint chip collection is mentioned. Does MA embrace the EPA change for paint chip collection? Training providers must now teach contractors how to do that? I don't see the paint chip collection in the training section as part of what is required to be trained. There needs to be a definition of what a paint chip sample is. There is not enough clarity in the draft regulation if this is now a possibility for contractors to collect paint chips for sampling.
- Paint chip collection sampling needs to be clarified that the MA law allows contractors to do paint chip sampling. If we are adopting the EPA paint chip sampling provision, that needs to be clarified.
- Will paint chip collection become an allowable practice for LSRs to now use in MA?

Previously commented above.

<u>Comment relating to record retention</u>

- Trainers must keep records for 10 years. What is the time that the licensed contractor must keep their records for?

DLS is consistent with the EPA RRP and incorporates by reference. Contractors are required to keep records for each job for a period of 3 years since completion.

**Other Issues**

- What is the rationale for restricting work under the Lead Regulations to those who are over 18? Is there an exception for this rule if a minor is enrolled in a vocational program?

Child labor laws were enacted to ensure that when those under age 18 work, the work does not jeopardize their health, safety, well-being or educational opportunities. In line with the US Department of Labor and the Office of the Attorney General in Massachusetts, DLS restricts deleading and lead-safe renovation work to persons over 18 years of age.

DLS is not aware of any exceptions to this requirement, even if a person is enrolled in a vocational program.

- State employees don't work on Saturdays and that's when work is going on, so illegal work occurs on the weekends with no consequences. Until the Building inspectors require this permit, you won't get contractors to get the LSRC license. We're causing more underground economy activity because there are laws that are not being enforced.

State employees have been known to work Saturdays, nights and holidays. DLS is sensitive to the delicate balance of a level field including continued outreach to local authorities and finding pathways for compliant work to occur in a cost effective manner.

- Property owners should be brought more into the loop, because work is going on on their properties that are in violation of the law.

DLS remains diligent in offering outreach materials to property owners.

- Recommends reworking entire regulation to regroup all of the RRP-related portions together. That would result in a more usable and readable regulation and enhance the understanding of the public and the contractors in their ability to refer to the regulation and understand what the requirements are.

DLS has attempted to clearly label and separate the different sections and requirements for Deleading and Lead-safe Renovation. However, the two disciplines cannot be completely separated because of allowances in both the DLS and DPH-CLPPP regulations for properly trained and licensed Lead-safe Renovation Contractors to perform certain types of deleading work. The purpose of this was to allow homeowners and property owners more options and control over who they could select to perform their deleading work. DLS will continue to publish information on its webpage (www.mass.gov/leadsafe) to make a clearer, more complete understanding of regulatory requirements for both property owners and contractors.
(See related question below).

- Suggests easier compliance protocols, like only hands on work procedures and no complex rules, no special tools or costly equipment with exception of HEPA vac or wet methods, low-cost, rules on one page, no paper work except one completion document, easy to remember and communicate orally to non-literate property owners.

DLS is happy to assist any property owner who has questions about low cost easy ways to perform compliant, safe work.

- Concern about LSR going into properties and telling owners they are moderate risk and high risk deleaders. These jobs are required to be done by authorized people. As a result, when the job is completed, owners are getting less than a letter of full abatement compliance. They need to be removed from liability and be able to get a tax credit.

As is the case with all hired work – buyer beware! DLS cannot presume mal-intent by either a contractor or a property owner. DLS will continue to publish information on its webpage (www.mass.gov/leadsafe) to make a clearer, more complete understanding of regulatory requirements of both property owners and contractors.

- Issue with unauthorized deleading – suggests requiring LSR Contractor sign a statement that the intent of this work is not for deleading or compliance purposes with the MA lead law and that statement be coordinated with CLPPP and DLS.

This suggestion is appreciated. However, it is not practical. Such language might be helpful in a written contract, assuming there is a written contract.

- When RRP firms are doing jobs and/or LSR, could they check the CLPPP database to see whether there is a history or report of lead paint on the property? Is there a report they can

refer to see whether there was lead paint surfaces on the property so then they don't have to worry about the lead test kits?

DLS is aware that certain trainers make it a point of explaining the availability of the CLPPP data base to their students. As a side note, DLS also sees the practicality of contractors treating all work as if it were lead work. This seems to be the most expedient way to protectively train a workforce and protect occupants and the environment.

- With the changes in the law language, will these changes allow your agency to enforce areas of worker protection or will this remain left for OSHA to enforce? If the latter, how do you see this working in a practical way?

As previously noted in an earlier question, DLS does not intend to enforce in areas where the agency is preempted by competent jurisdiction. DLS will continue its mission along with other agencies as a matter of protecting the workers and the public. DLS will address worker protection in those areas that are not afforded protection by OSHA.

- It seems overall, that work place areas are not defined as sq ft from the area you disrupt a painted surface as it is in the EPA law. Is this intentional or an oversight?

As noted in an earlier discussion of changes made in 2010, DLS encourages contractor compliance via performance standards and engineering controls. A savvy contractor who is containing the dust and debris generated by his work through the use of dust minimization techniques and dust capturing methods at the point source saves time and associated costs by not having prescribed square footage requirements. DLS believes this to be part of the solution to encouraging lead safe techniques.