

Comments and DDOE Responses to Third Proposed Rulemaking

Comment from The Downtown Cluster of Congregations, Terrance Lynch, Executive Director:

Comment 1: “I understand that these proposed regulations have now been revised and published for the 3rd time in the past several years. I greatly appreciate the thorough review, vetting, and community input process that has been undertaken to achieve the best possible regulations to ensure the safety of the District’s residents, families, and workers. Given the extensive steps that have been taken, I believe it is now time to move forward with these proposed regulations that will allow the Department of the Environment to act in the best interests of all.”

Response 1: DDOE agrees with the comment.

Joint Comments from District of Columbia Building Industry Association (DCBIA) and the Apartment and Office Building Association of Metropolitan Washington (AOBA):

Comment 1: “The requirement to both obtain a DDOE permit for essentially any renovation work (more than two square feet of disturbed paint per room) and, as well, to file a full clearance report (dust sampling and lab analysis) at conclusion is a regulatory redundancy, particularly given the additional requirement for clearance reporting at lease turnover.”

Response 1: The proposed regulations do not require a DDOE permit “for essentially any renovation work,” as contended by DCBIA/AOBA. Instead, the sections pertaining to renovation work, which are found in proposed § 3310, specifically state that a permit is required only if work that disturbs painted surfaces exceeds 500 square feet or costs more than \$20,000 to perform. (See § 3310.1(a) and (b).) The proposed regulations even contain three exceptions to the permitting requirement, which further limit the universe of jobs that would trigger the need for a permit. They are enumerated in § 3310.3(a), (b), and (c). As for the “additional requirement for clearance reporting at lease turnover,” this statutory requirement is intended to ensure lead safety for at-risk populations upon rental unit turnover, and has nothing to do with ensuring lead safety upon completion of renovation work so extensive in its disturbance of painted surfaces as to require a DDOE permit.

Comment 2: The commenters concede that the proposed rulemaking “reflects the aggressive reach of the underlying legislation,” and state that “implementing that reach is likely to tax the organizational capacity of DDOE and result in higher housing costs and project delays.” The commenters urge “a more manageable approach to [lead-based paint] regulations - one less directed at the elimination of all lead-based paint, and one more specifically targeted at the mitigation of lead-based paint hazards to at-risk populations.”

Response 2: DDOE is following basic principles of rulemaking in proposing regulations that implement the letter and spirit of the underlying legislation. Moreover, it is incorrect to interpret either the legislation or the proposed regulations as striving to “eliminate all lead-based paint.” The focus of both the rulemaking and the underlying legislation is the elimination of lead-based paint hazards. It is critical to understand the distinction. The mere presence of lead-based paint in and of itself does not pose an imminent threat of exposure to lead, provided the lead-based paint is in intact condition. Both the proposed regulations and the underlying legislation focus instead on identifying and eliminating deteriorating lead-based paint and such other lead-based paint hazards as lead-contaminated dust and lead-contaminated bare soil. The approach taken in the proposed regulations does not differ in substance from DDOE’s current enforcement of the Act, occurring without the benefit of clarifying regulations. Accordingly, DDOE does not anticipate a significant increase in its workload resulting from the promulgation of these regulations, and DDOE believes that the fears of higher housing costs and project delays expressed by DCBIA/AOBA are unfounded.

Comment 3: The commenters note that data show a significant decline in blood lead levels in the population of District children, and state that “only fifteen cases in 2011 were above the lowest rung of recorded blood levels (10-14 micrograms per deciliter).”

Response 3: DDOE agrees that childhood lead poisoning is on the decline in the District, in great part thanks to its enforcement efforts over the past four years. This rulemaking is designed to continue that momentum and to clarify for all concerned the specific requirements that the underlying legislation only characterizes in broad strokes. It is also critical to clarify that “the lowest rung of recorded blood [lead] levels” is not 10-14 micrograms per deciliter, but instead is 5-9 micrograms per deciliter, and that accordingly hundreds of District children remain exposed to lead such that their blood lead levels fall within this range and are high enough to cause potentially irreversible harmful health effects, per the US Centers for Disease Control and Prevention. The Mayor of the District of Columbia has already agreed to increase DDOE’s staff of lead inspectors by two additional full-time employees, beginning in Fiscal Year 2014, in order for DDOE to be able to conduct the lead inspection activities needed to fully enforce this rulemaking, taking into account the critical 5-9 microgram per deciliter category of blood lead levels.

Comment from Charles Turner:

Comment 1: The commenter suggests that proposed § 3312.1(a) should be modified to either always exempt individuals who perform lead-based paint activities in a residence that they own from having to be certified in accordance with proposed § 3307.1, or alternatively to withhold the exemption only if a lead poisoned child is present.

Response 1: DDOE’s concern about preventing lead poisoning extends to owner-occupied housing, which is where virtually half of the District children live who were

identified with an elevated blood lead level during the past Fiscal Year (FY 2012), through May 2013. Moreover, the underlying statute singles out pregnant women and children under six years of age as the most at-risk members of the population, and many of the statute's key provisions provide for additional protective measures to ensure their safety. Generally speaking, DDOE's proposed regulations do so as well, as is the case in the particular section the commenter points to. This is consistent with the underlying statute's focus and intent. Accordingly, DDOE believes it is appropriate -- and consistent with legislative intent -- to provide additional safeguards to ensure lead safety in the homes of children less than six years of age and in homes where pregnant women live, regardless of whether the homes are owner-occupied or rental units.