COLUMN BY | LYNN L. BERGESON

ONGOING CONCERN

EPA PROPOSES TO LOWER DUST-LEAD HAZARD STANDARDS

Reducing childhood lead exposure has long been a focus of the U.S. Environmental Protection Agency (EPA). The Flint, Mich., water crisis has inspired renewed concern with lead exposure and heighted attention on the hazards occasioned by exposure to dust and dust-lead, especially exposure to children. On July 2, 2018, EPA proposed to lower the dust-lead hazard standards for homes with dust-lead issues. This column summarizes the proposal.

Background

Lead-based paint was commonly used in residential housing until 1978. Certain activities, including remediation, modifications, lead abatement and related activities in houses with lead-based paint are subject to requirements established by the federal government. These measures are intended to limit the opportunity to disturb the lead in lead paint and thus make it available for exposure to humans and the environment. The requirements are reflective of a Congressional intent to protect families from exposure to lead from paint, dust, and soil, as expressed in the Residential Lead-Based Paint Hazard Protection Act of 1992, also known as Title X. Section 1018 of the law required EPA and the U.S. Department of Housing and Urban Development (HUD) to require the disclosure of known information on lead-based paint and lead-based paint hazards before the sale or lease of most houses built before 1978. The 1992 law also amended the Toxic Substances Control Act (TSCA) to add a new subchapter titled Title IV-Lead Exposure Reduction. EPA issued the July proposal pursuant to its authority under TSCA Sections 401, 402, 403, and 404. The main components of these regulations, codified at 40 C.F.R. Part 745 and 24 C.F.R. Part 35, form the foundation of EPA's dust-lead hazard standards.

EPA established a dust-lead hazard standard of 40 micrograms per square foot (gg/ft2) for floors and 250 gg/ft2 for window sills in a Jan. 5, 2001, final rule. In the 2001 final rule, EPA examined the health effects of various dust-lead loadings, and analyzed those values against issues of practicality to determine the appropriate standards. At that time, the Centers for Disease Control and Prevention (CDC) identified a test result of ten micrograms

of lead per deciliter of blood (gg/dL) or higher in children as a "level of concern." Based on the available science at the time, EPA explained that health effects at blood lead levels lower than ten gg/dL were "less well substantiated." Further, EPA acknowledged that the standards were "based on the best science available to the Agency," and if new data were to become available, EPA would consider changing the standards to reflect these data. EPA states that new data have become available since the 2001 final rule that indicate to EPA that health risks exist at lower blood-lead levels than previously recognized.

Given the availability of new information and the CDC determination, former EPA Administrator Scott Pruitt hosted a meeting in February 2018 of principals from the 17 federal departments and agencies that are represented on the President's Task Force on Environmental Health Risks and Safety Risks to Children. The Task Force reviewed the findings of the CDC, concluding that no safe blood-lead level in children has been identified and that, accordingly, CDC is no longer using the term "level of concern." Since 2012, CDC has been using a "reference value" to identify children who have been exposed to lead and who should undergo case management to address the effects of the exposure. The reference level is based on the 97.5 percentile of the U.S. population distribution of blood-lead levels in children ages one to five from the 2007-2008 and the 2009-2010 National Health and Nutrition Examination Surveys.

In the July proposal, EPA seeks to lower the dust-lead hazard standard for floor dust to ten gg/ft2 and to lower the dust-lead hazard standard for window sill dust to 100 gg/ft2. The proposed rule also seeks to comply with the December 27, 2017, decision of the U.S. Court of Appeals for the Ninth Circuit, and a subsequent March 26, 2018, judicial order that directed EPA to issue a proposed rule within 90 days from the filed date of the order. A Community Voice v. EPA, No. 16-72816 (Dec. 27, 2017). The lawsuit was brought against EPA by environmental and health advocacy groups that claimed EPA had unreasonably delayed updating the dust-lead hazard standard to align with more recent advancements in science and EPA's and the health community's greater understanding of the harm that lead exposures can cause to humans, especially children.

In the proposal, EPA states that reducing childhood lead exposure is an EPA priority, and that EPA continues to collaborate with other federal agencies to reduce lead exposures. At the aforementioned Task Force meeting, Task Force members committed to make addressing childhood lead exposure a priority and to develop a federal strategy to reduce childhood lead exposures. The July proposal "is one component of EPA's prioritizing the important issue of childhood lead exposure."

Current best available science, which, as indicated above, has evolved considerably since 2001, continues to inform EPA's understanding of the relationship between exposures to dust-lead loadings, blood-lead levels, and risk of adverse human health effects. EPA believes that these new data and science are driving its lowering of the dust-lead hazard standard.

EPA requested comment on several topics. EPA asked for comment on the achievability and appropriateness of the proposed dust-hazard standard in the ranges proposed. EPA requested comment on all aspects of this proposal, including all options presented in the economic assessment and the technical support document that accompanied this proposal. EPA also requested comment on whether it has properly characterized the neurodevelopmental effects of lead in children, and specifically requested additional studies that support the quantification and monetization of these neurodevelopmental effects in EPA's analyses.

EPA proposed no changes to the definition of lead-based paint due to what EPA characterized as "insufficient information" to support such a change. EPA requested comment, however, on the proposal to make no change to the definition. EPA also requested comment on its proposal to provide states, territories, and tribes up to two years to demonstrate that their programs include any new requirements that EPA may promulgate.

Discussion

As a top priority of the Trump Administration, the proposal to lower the dust-lead hazard standards comes as no surprise to those engaged in this space. For stakeholders with interests in this area, this is a rulemaking to watch. Given heightened scrutiny to lead exposures in general, litigants will be on the lookout for opportunities to pursue those that do not address lead exposure opportunities adequately or at all, particularly those that impact children. Similarly, EPA will be keen to ensure that current enforceable standards, and any lower standards that ultimately come into effect, are strictly observed. **mt**

Lynn L. Bergeson is Managing Partner of Bergeson & Campbell, P.C. (B&C), a Washington, D.C. law firm focusing on conventional, nanoscale and bio-based industrial, agricultural and specialty chemical product regulation and approval matters; environmental health and safety law; chemical product litigation; and associated business counseling and litigation issues. Bergeson is President of The Acta Group (Acta), with offices in Washington, D.C., Manchester, UK, and Beijing, China, and President of B&C Consortia Management LLC (BCCM) with offices in Washington, D.C. Visit www.lawbc.com for more information.