

Lead-Based Paint

The Law in Indiana

**A Manual for Judges, Lawyers, Advocates,
State and Local Officials,
Landlords, Tenants, and Contractors**

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Electronic copies of all the materials contained in the Appendices are available and downloadable at the Improving Kids' Environment, Inc. website:
www.ikecoalition.org.

Introduction

Lead poisoning continues to threaten Indiana's children. Although it is more of a concern for low income children who live in older and poorly maintained housing, the widespread use of lead-based paint until 1978 means that any house or apartment built before then may be a source of lead poisoning and, thus, any child may be at risk. Important federal laws adopted in 1992 have steered this country's efforts to eliminate the threat of lead hazards. Additionally, the Centers for Disease Control and Prevention have included as part of the National Healthy People 2010 program the goal of eliminating childhood lead poisoning by that date.¹

There are a number of comprehensive and helpful resources readily available about lead-based paint and childhood lead poisoning. The websites of the CDC, HUD and EPA are good places to start.² The purpose of this book is to provide a comprehensive summary of the laws and regulations that address the issue of lead-based paint and lead hazards in Indiana. If we are to achieve the goal of eliminating lead poisoning by 2010, we must be aware of, and use, all existing tools at our disposal.

The intended audience for this manual is broad:

- judges and other court personnel who may have a case involving lead paint or lead poisoning come before them;
- elected officials in a position to make policy decisions for their jurisdiction;
- attorneys representing families with lead poisoned children or lead hazards in their home;
- employees of local public Health or Housing Departments who work to identify and reduce threats of lead poisoning;
- tenants and homeowners with children who are at risk or who have been identified with an elevated blood lead level; and
- landlords, property owners and managers, real estate agents and contractors who need to know their rights and responsibilities.

¹ In January 2000, the Department of Health and Human Services launched [Healthy People 2010](#), a comprehensive, nationwide health promotion and disease prevention agenda. Healthy People 2010 contains 467 objectives to serve as a road map for improving the health of all people in the United States during the first decade of the 21st century. The two objectives related to lead poisoning are Objective 8-11: Eliminate elevated blood lead levels in children (from a baseline of 4.4%); and Objective 8-22: Increase the proportion of persons living in pre-1950s housing that has been tested for the presence of lead-based paint to 50% (from a baseline of 14%). The Indiana State Department of Health adopted the goal of eliminating childhood lead poisoning in its [2004 Childhood Lead Poisoning Elimination Plan](#).

² See, www.epa.gov/lead; www.cdc.gov/nceh/lead; and www.hud.gov/offices/lead. CDC's comprehensive publications "Preventing Lead Poisoning in Young Children" (1991 and 2005 versions) provide an excellent introduction. There is also an excellent history of the federal regulatory program and background on lead-based paint issues in the preamble to USEPA's proposed Renovation, Repair and Painting Rule. [17 Fed. Reg. 1588](#) (January 10, 2006).

Overview of Lead Paint and Children's Health³

It can often be extremely difficult to make the connection between exposure to a particular pollutant, or combination of pollutants, and human disease or injury. Not so with lead. The physical effects of lead in the body are very well understood and documented. The effects on young children can be devastating, leading to permanent loss of IQ, developmental challenges, and the potential for violent tendencies that can affect them throughout their lives.^{4,5,6,7}

Lead is a heavy, malleable metal that people have used in a variety of ways for centuries. It is very dense, soft and workable, resists corrosion, and has a low melting point. Early industrial uses included plumbing,⁸ kitchen implements, coins, printer's type, crystal and ceramics. Lead can still be found in a variety of products such as certain cosmetics, spices, candy and candy wrappers, metallic toy trinkets and toy jewelry, medicines (including vitamins), plastics (as an additive to make the plastic more durable), glazes and paints on food and beverage containers, solder, plumbing, and certain colored inks or coatings.

The addition of lead to paints, stains and other coatings was seen as beneficial because it made the paint faster drying, more durable, enhanced the visual effect of pigments, and made the painted surface more resistant to corrosion.⁹ Lead-based paint was used widely for residential purposes in the United States throughout the 20th century until it was banned for that purpose in 1978.¹⁰

³ Basic information about lead is widely available from a number of resources. This section draws heavily from EPA's training manual for the Lead Inspector Initial Course, *Inspecting for Lead-Based Paint Student Manual* (May 2000 edition), which is available for purchase through the National Technical Information Service, www.ntis.gov, and supplementary training materials developed by the Environmental Management Institute in Indianapolis, www.envtlmgmt.org.

⁴ Needleman H, Gunnoe C, Leviton A. Deficits in psychologic and classroom performance of children with elevated dentine lead levels. *N Engl J Med* 1979; 300:689-95.

⁵ Needleman H, Schell A, Belling D. The long-term effects of childhood exposure to low doses of lead: an 11 year follow-up report. *N Engl J Med* 1990; 322:83-8.

⁶ Needleman HL, Riess JA, Tobin MJ, Biesecker GE, Greenhouse JB. Blood lead levels and delinquent behavior. *JAMA*. 1996;275:383-69.

⁷ Canfield RL, Henderson CR, Cory-Slechta DA, Cox C, Jusko TA, Lanphear BP. Intellectual impairment in children with blood lead concentrations below 10µg per deciliter. *N Engl J Med*. 2003; 348:1517-1526.

⁸ The Roman plumbing system used lead as a primary material; it is thought that the decline of the Roman Empire may have been due to widespread lead poisoning among the citizenry.

⁹ The famous Golden Gate bridge got its original color from lead-containing red litharge in the paint.

¹⁰ In 1978, the Consumer Product Safety Commission banned the use of paint with more than 0.06% lead in residential uses. [16 CFR 1303](http://www.cpsc.gov). See [http://www.cpsc.gov/](http://www.cpsc.gov) for more information. Lead-based paint is legal, and still widely used, for non-residential purposes.

Past lead control policies have resulted in substantial reductions in childhood lead poisoning; however, hazards still exist and continue to threaten children's health. Beginning in the late 1970's and ending in the late 1990's, a significant decline in blood health levels of U.S. children aged 1-5 occurred.¹¹ This decline is felt to be primarily due to the phase-out of leaded gasoline, and the resulting decrease in lead emissions. Additional contributors were the elimination of lead in water pipes and tin can solder, and the ban on the use of lead paint in residential housing. Although these policies reduced the number of lead poisoned children, lead that is already in the environment continues to poison children today.

Approximately 87% of homes built before 1940; 69% of homes built between 1940 and 1959, and 24% of homes built between 1960 and 1978 have lead-based paint.¹² Lead based paint and lead contaminated dusts located in these homes harm more than 2/3 of lead poisoned children. Across the country, the United States Environmental Protection Agency (USEPA) estimates that approximately 38 million houses contain deteriorated leaded paint or elevated levels of lead contaminated dusts (40% of all housing units).¹³ These numbers illustrate the present threat lead poses to children's health despite a past decline in lead poisoning.

Lead can enter the body through the skin, through ingestion (from water, food, lead dust from contaminated soil or paint debris), or through inhalation (of lead dust). Ingestion is the most common route of exposure in young children. Lead does not break down or change into something else in the body. What is not eliminated will damage body systems, especially the central nervous system. Lead is also absorbed into soft tissue and bone, where it takes the place of calcium and can remain there for many years.¹⁴ Since there are often no symptoms of lead poisoning, a blood test is the only way to detect it. Low-income, minority children living in urban environments are at greatest risk of elevated blood lead levels because they are more likely to be exposed to lead contaminated dust from deteriorated lead-based paint in substandard housing.

Toddlers are most at risk of lead poisoning. Toddlers can more readily ingest lead-based paint dust, chips and debris and lead-contaminated soil because as part of their normal development they spend much of their time on the floor, where dust accumulates, and they put everything in their mouths. Also, their blood brain barrier is not yet fully formed, so lead can easily cross over from the blood into the brain where it can cause irreversible damage. Blood lead levels will drop quickly once the child is removed from the source of exposure. Waiting until the child is exposed is an ineffective and dangerous strategy, however, since by that time irreversible damage may have already been done.

¹¹ Schwemberger JG, Mosby JE, Doa MJ, US Environmental Protection Agency. Jacobs DE, Ashley PJ, US Dept of Housing and Urban Development, Brown MJ, Jones RL, Homa D, National Center for environmental Health, CDC. Blood Lead Levels – United States 1999-2002. MMWR 2005; 54(20):513-16.

¹² [71 Fed. Reg. 1588, 1599](#) (January 10, 2006).

¹³ [71 Fed. Reg. 1588, 1591](#) (January 10, 2006).

¹⁴ Nordberg, GF, Mahaffey KR, Fowler BA. Introduction and Summary. International Workshop on Lead in Bone: Implications for Dosimetry and Toxicology. Environmental Health Perspectives. 1991; 21:3-7.

The health effects of lead poisoning in young children are very well documented.¹⁵ Recent research is finding adverse effects at increasingly lower blood lead levels. According to the CDC, there is no safe level of exposure.¹⁶ The health effects include lowered IQ, poor hearing, speech, language and coordination problems, learning disabilities, behavioral disorders, hyperactivity, stomach aches and other problems. At extremely high levels of exposure, lead poisoning can cause seizure, coma, and even death.

Childhood lead poisoning continues to pose a public health problem. The Centers for Disease Control and Prevention estimates that nationwide approximately 310,000 children aged 1-5 have blood lead levels greater than 10 micrograms of lead per deciliter, the CDC's current action level recommendation for reducing a child's exposure to lead.^{17, 18}

According to CDC's National Health and Nutrition Survey (NHANES) data from 1999-2002, 1.6% of all children under the age of 6 had elevated blood lead levels (i.e., blood lead level $\geq 10\mu\text{g}/\text{dL}$) compared to 3.1% of black (non-Hispanic) children of the same age.¹⁹ This disproportionate threat to children from different ethnic populations illustrates lead poisoning's unjust effects, however, *all* children living in or playing around old homes are at risk.

A US Healthy People 2010 goal is to eliminate elevated blood lead levels in young children (Objective No. 8-11).²⁰ Primary prevention is key to this goal. Primary prevention focuses on preventing exposure prior to a child becoming exposed to lead, rather than treating children after exposure. This emphasis on primary prevention recommends state and local health departments shift their focus away from secondary prevention (which is providing follow-up services to children already exposed), and develop regulatory tools that will further childhood lead poisoning prevention. State and local courts across the country are now flooded with cases concerning lead inspection and abatement prosecutions, housing violations, and landlord/ tenant disputes over lead violations. Only when states adopt aggressive primary prevention programs and strict regulatory structures for safe housing will the threat of childhood lead poisoning decline significantly.

¹⁵ See, for example, <http://www.atsdr.cdc.gov/toxprofiles/tp13.html>.

¹⁶ See "Preventing Lead Poisoning in Young Children," CDC, August 2005, p. 1 (<http://www.cdc.gov/nceh/lead/Publications/PrevLeadPoisoning.pdf>).

¹⁷ Id.

¹⁸ 10 $\mu\text{g}/\text{dL}$ is the equivalent of 1 ounce in a swimming pool 6 feet deep, 20 feet wide, and 85 feet long.

¹⁹ CDC, MMWR 54(20): 513-516 (May 27, 2005).

²⁰ See www.healthypeople.gov/document/html/objectives/08-11.htm.

How Does Paint Poison Children?

Well maintained paint poses only a minimal risk to children. Unfortunately, much of the older housing stock in the United States is not well maintained, especially rental housing, and keeping it clean and free of lead dust is a challenge.

Paint becomes damaged and deteriorates with age or when it becomes water-damaged. Chipping, peeling, or otherwise deteriorating paint creates lead-contaminated dust that is the real threat to children. Lead-contaminated dust and soil are also tracked inside from outside the home. Dust is commonly found in areas of high friction or impact, for example window sills and sashes, staircases, around door frames, and where paint has deteriorated.²¹ Hand-to-mouth activity on the floor is the way most young children are exposed to lead. Chips and dust on window sills and in window troughs are another route of exposure, and are also a good indicator of whether the floor is dusty.

Burning, scraping or sanding paint also generates tremendous amounts of dust, so an innocent and well-meaning effort to spruce up a child's room can result in serious health hazards.²² Thorough and regular cleaning is critical in homes with lead-based paint, however lead-contaminated dust particles are so small that they are essentially invisible.²³ Lead dust can accumulate on toys (which children often put into their mouths) as well as on couches and other furnishings. Sources of lead exposure outside the home include deteriorating exterior paint and lead-contaminated soil (soil is contaminated either with paint debris from the outside of the home or from outdoor structures such as fences, sheds, porches, or with residual lead left in the environment from the use of leaded gasoline (especially in neighborhoods of historically high traffic).

Lead Poisoning in Indiana and Marion County

Childhood lead poisoning is a serious issue across Indiana and in Marion County. The state has a high percentage of older housing, and many at risk children.²⁴ According to the 2000 Census, 28.3% of Indiana's housing statewide and 24.5% of the housing units in Marion County were built before 1950. Although children of any socio-economic status may become lead poisoned, lead poisoning is more prevalent among children in poverty because they are more likely to be exposed to lead in old and

²¹ Lead-based paint was more likely to be used in areas of high friction and impact, because of its durability.

²² Pregnant women should never participate in fixing up the baby's room if it involves removing old paint.

²³ EPA has established 40 micrograms per cubic meter as the hazard level for lead dust on floors. [40 CFR 745.65\(b\)](#). This is equivalent to a small packet of sweetener sprinkled over an area one third the size of a football field.

²⁴ The statistics in this section are taken from the Indiana State Department of Health's [2005 Report on Childhood Lead Poisoning](#), available at http://www.ikecoalition.org/documents/ISDH_Blood_Lead_2004.pdf.

substandard housing. The 2000 Census reports that 14.4% of children under 6 in Indiana are considered to be in poverty; in Marion County, it is 17.2%.

ISDH's report of blood lead testing for 2004 reports that 40,236 children were tested statewide. Of those, 1038 (2.7%) had a blood lead level \geq 10 micrograms/deciliter and 470 (1.25%) had a confirmed elevated blood lead level.²⁵ The data for 2005 show that 43,120 children were tested and 548 (1.27%) had a confirmed elevated blood lead level.²⁶ It is important to realize, however, that only a small percentage of Indiana children, and even children at high risk of lead poisoning, actually have their blood tested as recommended. ISDH estimates that 8% of children under 6 statewide and 6% of Medicaid-eligible children had their blood tested. However, ISDH's statistics are incomplete because of inadequacies in the reporting system.²⁷

In Marion County in 2004, 12,480 children were lead tested and 129 (1.03%) had a blood lead level of 10 micrograms per deciliter or higher.²⁸ Compare this to 1999, when 4,967 children were tested, of whom 371 (7.5%) had elevated blood lead levels. Clearly, progress has been made both in the number of children receiving tests and in the number of children who are lead poisoned.

²⁵ Calculated by ISDH Lead Epidemiologist Dr. Anil Mangla based on STELLAR data. Because the capillary blood test (fingertip) has a high rate of false positives, a confirmed blood lead level is either a single venous test or a second capillary blood test performed within 12 weeks or less (depending on the level), both with an elevated level.

²⁶ See www.ikecoalition.org/Lead/Legislative_report_2005_Final.htm.

²⁷ Legislation enacted in 2005 will greatly improve Indiana's ability to track blood testing and to increase the numbers of children having the required test. See [Senate Enrolled Act No. 538](http://www.in.gov/legislative/bills/2005/SE/ES0538.1.html), <http://www.in.gov/legislative/bills/2005/SE/ES0538.1.html>.

²⁸ Dave McCormick, Lead Program Manager of the Marion County Health Department's Childhood Lead Poisoning Prevention Program, estimates that less than 10% of children under 6 receive recommended (or, in the case of Medicaid eligible children, required) lead tests.

Guide to the Chapters of this Book

This book is organized thematically. Rather than summarize each law or regulation individually, the material is organized in a way we hope will be helpful to the users, depending on their specific situation. Landlords, tenants, home buyers, home sellers, home owners and contractors have different rights and responsibilities. There are laws that apply to the selling and leasing of housing, laws that apply when work is done on houses that may disturb lead based paint, laws that apply to federally-subsidized housing, etc. As cases may arise in a variety of contexts, we hope the organization of the material in this book will make it easier to find relevant information. The appendices include a Glossary of Common Terms ([Appendix A](#)), summaries of the key federal and state laws and regulations ([Appendix B](#)), copies of key laws ([Appendix C](#)), sample pleadings and other documents we hope will be useful to readers ([Appendix D](#)), and links to organizations that may be helpful for additional research or assistance ([Appendix E](#)).

With a few notable exceptions, the law on lead paint in Indiana derives from federal law or state law that implements federal law. We hope, therefore, that this manual will be useful to those outside of Indiana or may be a template for development of similar resources in other states. As a result, we make clear throughout whether requirements are based on federal, state, local or common law. IKE welcomes adoption and adaptation of this material.

Rights and Responsibilities of Tenants and Landlords

Many Hoosier children live in rental housing that was built before 1978. Even well maintained property can pose lead hazards because of the presence of deteriorating paint and dust, though poorly maintained and substandard housing presents the most clear and obvious health threat. Lead hazards in rental housing can be present inside the tenant's apartment and in common areas such as hallways, basements, laundry rooms, and play areas.²⁹

Statutory and common law establish responsibilities of landlords and rights of tenants to safe and healthy housing. Other laws are specific to lead-based paint in housing and provide additional requirements.³⁰

A. Before the Tenant Moves In; the Landlord's Duty to Disclose Information About Lead-Based Paint

1. The Duty to Disclose

Before a lease is signed, federal law requires landlords (or their agents) to disclose to prospective tenants any information they have about the presence of any known lead-based paint or lead-based paint hazards on the property.³¹ Implemented through rules of the U.S. Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD), the requirements are the following:

Before the lessee is obligated under any contract, the lessor must:

- (1) Provide the lessee with a lead hazard information pamphlet, such as EPA's lead hazard information pamphlet titled "[Protect Your Family from Lead in Your Home](#)" (#747-K-94-001) or an equivalent pamphlet that has been approved for use in the state by EPA;
- (2) Disclose to the lessee the presence of any known lead-based paint and/or lead-based paint hazards in the rental unit and common areas. This includes disclosure of any information available concerning the paint or hazards, such as the basis for the determination that hazards exist, the location of the lead-based paint and/or hazards and the condition of the painted surfaces;
- (3) Provide copies of records and reports available to the lessor pertaining to the lead-based paint and/or lead-based paint hazards, including records on common

²⁹ A recent study by the Marion County Health Department found that in 97% of the multi-family units surveyed, common areas had lead levels that exceeded acceptable limits.

³⁰ A very helpful note called "Landlord's Lead Paint Liability" summarizes state cases where tenants have brought suit against landlords as a result of lead poisoning. 19 ALR 5th 405 (1994).

³¹ See the [Residential Lead-Based Paint Hazard Reduction Act of 1992](#) (42 U.S.C. 4851 et seq.).

areas. The landlord must also provide records on other residential units in multifamily housing, if the information is part of an evaluation or reduction of lead-based paint and/or lead-based paint hazards in the target housing as a whole.

(4) Attach specific disclosure and warning language to the lease.^{32,33}

What does this mean as a practical matter? If the landlord or agent has any information regarding the presence of lead-based paint or lead-based paint hazards on the property,³⁴ he or she must disclose that to the prospective tenant before the tenant signs the lease. A landlord would have such information if the property had been inspected for lead or lead hazards either through a private contractor at the request of the landlord or by a public agency (such as HUD, a local Health Department, the [Indiana Housing Community Development Authority](#) or other similar agencies), or if the landlord or a prior tenant had done any investigation on their own.³⁵ A code enforcement order that includes lead test results must certainly be provided to the tenant. All documentation must be provided to the tenant free of charge.³⁶ However, there is no affirmative obligation on the landlord to assess the property for lead-based paint or lead hazards.³⁷ The disclosure obligation exists at the time of signing the lease, renewal, or if there is a significant change in the terms of the lease.³⁸ There is no requirement to provide a tenant with information about lead-based paint or hazards the landlord gets after the lease is signed.

Failure to comply with these disclosure requirements is not uncommon. In the case of a landlord's failure to disclose, EPA or HUD may enforce the disclosure requirements and seek civil penalties of up to \$10,000 per violation. The tenant may also bring a civil action; the lessor is liable for up to three times the amount of the damages, and the tenant can recover attorney and expert witness fees.³⁹ [42 USC 4852d\(b\)\(3\)](#); [40 CFR 745.118](#).

³² EPA and HUD have nearly identical rules, found at [40 CFR 745.100](#) and 107 (EPA) and [24 CFR 35.88](#) (HUD).

³³ The Lead Warning Statement must include the following specific language: Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention. [40 CFR 745.\(b\)\(1\)](#). This is a very clear and succinct statement of the issue.

³⁴ This includes information for the specific unit, for the common areas, and for other residential units in a multi-family building.

³⁵ EPA Guidance is clear that landlords must disclose the results of home lead test kits. EPA's "Lead-based Paint Disclosure Rule Interpretive Guidance Part II" (December 5, 1996), p.6, Answer #40; <http://www.hud.gov/offices/lead/guidelines/discosurerule/part2disclosureguidance.cfm>.

³⁶ See EPA's "Lead-based Paint Disclosure Rule Interpretive Guidance Part I" (August 21, 1996), p. 6, Answer #13; <http://www.hud.gov/offices/lead/guidelines/discosurerule/index.cfm>.

³⁷ And, unfortunately, the disclosure obligation has created a disincentive for owners to investigate their property.

³⁸ See EPA's "Lead-based Paint Disclosure Rule Interpretive Guidance Part III" (August 2, 2000), p. 5, Answer #60; <http://www.hud.gov/offices/lead/guidelines/discosurerule/part3disclosureguidance.cfm>.

³⁹ In [Smith v. Caldwell Banker Real Estate Services](#), 122 F. Supp. 2d 267, at 274(D. Conn. 1999), the court wrote: "Private enforcement of the lead paint disclosure requirements does not supplant or replace public enforcement by the federal government, but rather provides an additional remedy, thereby increasing the likelihood that the violator

2. How and Where to Bring a Claim

The Residential Lead-Based Paint Hazard Reduction Act of 1992 clearly provides a basis for enforcement of the landlord's disclosure obligations. In Indiana and elsewhere, actions for failure to disclose have for the most part resulted in settlements where landlords agree to address lead hazards in their properties. In the federal cases, HUD and EPA have achieved effective settlements where landlords have agreed to test all their properties and abate all documented lead-based paint and lead-based paint hazards.⁴⁰ Advocates in Indiana have referred a number of cases to EPA and HUD for enforcement action for failure to disclose. Those actions are pending.

The law also provides a basis for a tenant to bring an action.⁴¹ A certified letter to a landlord can sometimes be sufficient to obtain immediate relief for the tenant, usually return of the security deposit and release from the lease so that the family can remove themselves from the hazardous housing. If a child has actually been poisoned, of course, damages can be significant. Other damages could include the costs of replacing furniture that is so loaded with lead it must be discarded. If the landlord does not respond to this type of notice, a tenant can file a complaint in federal court or in the local Indiana Superior or Circuit Court. Plaintiffs should seek all damages, an order that the landlord remediate the lead hazards, and attorney and other fees. See [Appendix D](#) for a sample letter and complaint alleging failure to disclose.

Lawyers defending tenants in eviction cases or representing them in affirmative cases should always find out how old the building is and ask the tenant whether the landlord provided information about lead paint when they signed their lease. The tenant should take steps to determine if lead-based paint is present, either by requesting the local health or housing department do an inspection or checking himself or herself using lead swabs generally available at the hardware or home store. If the tenant has young children, lawyers should ask whether they have been tested for lead and urge them to do so promptly if the building was built before 1978 and, especially, if there is peeling or chipping paint visible.

is discovered and such illegal conduct is discouraged. While the automatic trebling of the plaintiff's actual damages incurred as a result of violating this federal statute certainly may serve some deterrent or disgorgement function, it also serves as an important incentive to those directly injured by the violation to seek compensation for their injury as well as their effort in enforcing the law."

⁴⁰ USEPA has settled or issued administrative orders in many actions where landlords failed to disclose information about lead hazards. See for example, http://www.epa.gov/region7/news_events/newsreleases/archive/n020499.htm.

⁴¹ The private right of action is explained thoroughly in "Private Civil Actions Under the Residential Lead-Based Paint Hazard Reduction Act of 1992" (2005), available at http://www.afhh.org/res/res_Operation_LEAP_toolkit_disclosure_Private_Causes_of_Action.htm.

B. After the Tenant Moves In: the Right to Healthy Housing

Sections 1 – 6 below describe the various statutes, codes and theories of common law that apply in housing cases. Section 7 addresses how a tenant or governmental agency would bring a claim under one or more of these authorities.

1. Indiana's Landlord/Tenant Law; Warranty of Habitability

Indiana's basic landlord/tenant law is set forth in [Title 32 of the Indiana Code](#). Both landlords and tenants have rights and responsibilities under this law.⁴² A written lease is not required to create the landlord/tenant relationship.⁴³ Neither the landlord nor the tenant can waive the requirements of this law.⁴⁴

The landlord's basic obligations are to:

- 1) deliver rental premises in compliance with the rental agreement and in a "safe, clean and habitable condition";
- 2) comply with all health and housing codes; and
- 3) make reasonable effort to keep common areas in a "clean and proper condition."⁴⁵

The tenant's basic obligations include the responsibility to:

- 1) comply with all obligations imposed primarily on a tenant by applicable provisions of health and housing codes;
- 2) keep the areas of the rental premises occupied or used by the tenant reasonably clean.⁴⁶

Rental housing with paint dust, or peeling or flaking paint on interior or exterior surfaces or in common areas would violate most housing codes, and therefore does not meet the warranty of habitability required as one of the landlord's basic obligations.⁴⁷

⁴² This law was adopted in 2002. Some provisions apply to lease agreements entered into after June 30, 2002; others to older leases.

⁴³ A "tenant" is a person who occupies a rental unit (1) for residential purposes; (2) with the landlord's consent; and (3) for consideration that is agreed upon by both parties. IC 32-31-10.

⁴⁴ If the lease includes a provision saying that the provisions of the state law do not apply, that provision is void. See, e.g., [IC 32-31-8-4](#).

⁴⁵ [IC 32-31-8-8](#).

⁴⁶ [IC 32-31-8-7](#).

⁴⁷ Indiana Legal Services has information available to assist with rental housing questions. See http://www.indianajustice.org/Home/PublicWeb/Library/Index/1690000/1690010/index_html#1690010.

2. Indiana's Health and Housing Codes

The State of Indiana has both a Health and a Housing Code. The Health Code is the one of interest for our purposes, because it addresses existing housing. The State Residential Housing Code, found in regulation at [675 IAC 13\(b\)](#) and [14](#), addresses issues relating to new construction, additions and some renovation activities.

a). *Indiana State Health Code.* Indiana's State Health Code is found at [IC 16-41-20](#). The key provisions of the Code are in Section 1:

A dwelling is unfit for human habitation when the dwelling is dangerous or detrimental to life or health because of any of the following:

- (1) Want of repair.
- (2) Defects in the drainage, plumbing, lighting, ventilation, or construction.
- (3) Infection with contagious disease.
- (4) The existence on the premises of an unsanitary condition that is likely to cause sickness among occupants of the dwelling.

No Indiana court has interpreted these provisions of the Health Code in the context of lead-based paint hazards, but arguably, peeling, chipping or otherwise deteriorating paint, lead dust, or contaminated soil in the yard render the dwelling "dangerous or detrimental to life or health because of (1) want of repair [and] (4) the existence on the premises of an unsanitary condition that is likely to cause sickness among occupants of the dwelling."

Local Health Departments and county health officers are authorized under the statute to enforce the provisions of the Health Code. These responsibilities generally include the authority to order the property to be vacated,⁴⁸ to declare the property a public nuisance and order abatement,⁴⁹ or to order a dwelling cleaned.⁵⁰ In 2004, the Vigo County Health Department "redtagged" a rental property in Terre Haute (declared it unfit for habitation) after the landlord refused to remediate lead hazards and indicated he intended to sell the property.⁵¹ A landlord who violates the Health Code or fails to comply with an order of a local health Department commits a Class B Misdemeanor and each day of continuing noncompliance is considered a separate violation.⁵²

Local Health Departments' general authorities are contained in [IC 16-20-1](#). They include the authority to inspect private property and order what is "reasonable and

⁴⁸ [IC 16-41-20-4](#).

⁴⁹ [IC 16-41-20-6](#).

⁵⁰ [IC 16-41-20-7](#).

⁵¹ See http://www.ikecoalition.org/LSITF_Newsletter/LSITF_Newsletter_Dec_2004.htm#Habitation for more information about this forceful action.

⁵² [IC 16-41-20-13](#).

necessary for prevention and suppression of disease.⁵³ Furthermore, the statute provides that “a person shall not institute, permit, or maintain conditions that may transmit, generate, or promote disease,” and that “a health officer, upon hearing of the existence of such unlawful conditions, shall order the abatement of those conditions.”⁵⁴

b). *Local Health and Housing Codes.* Some Indiana counties and cities also have local health or housing codes, though there is no comprehensive summary of which do and which do not.⁵⁵ The larger cities are more likely to have such codes. In some cases, the jurisdiction of the code encompasses both the city and county (for example, the Marion County Health Department). Requirements for safe and habitable housing may be found in a Health Code, Housing Code, or code that addresses both. Some codes specifically prohibit peeling and deteriorated paint; others contain a more general obligation to provide safe and habitable housing.

Municipal corporations are empowered to enforce their ordinances by [IC 36-1-6](#). If a condition violating a municipal ordinance exists on real property, the city may enter onto the property and take appropriate action to bring the property into compliance, though it must give the property owner not less than 10 and not more than 60 days to bring the property into compliance. [IC 36-1-6-2](#). Section 4 also states that “a municipal corporation may bring a civil action to enjoin any person from . . . violating an ordinance regulating or prohibiting a condition or use of property.” [IC 36-1-6-4](#).

i. Marion County. In Indianapolis, lead based paint in housing is primarily addressed through [Chapter 10 of the Housing and Environmental Standards Ordinance](#) of the Marion County Health Department (MCHD).⁵⁶ Chapter 10 was promulgated in 1996 and is one chapter in the [Revised Code of the Consolidated City and County of Indianapolis and Marion County](#). Key provisions that address lead-based paint are:

- [Section 10-301\(a\)](#): An owner may not allow occupancy of a dwelling unless the premises are clean, sanitary and fit for human occupancy;
- [Section 10-309](#): No owner or occupant shall apply a lead-containing paint to any surface in or on any dwelling, rooming house, fence or accessory building or structure;
- [Section 10-703](#): Every foundation, roof, exterior wall, door, skylight and window shall be reasonably weather- and water-tight, capable of preventing dampness. These building

⁵³ [IC 16-20-1-23](#)

⁵⁴ [IC 16-20-1-25\(a\) and \(b\)](#).

⁵⁵ Codes for some Indiana cities, counties and towns are available through <http://www.municode.com/>. Although this is a subscription service, the site includes a free library, where one may find individual county codes. As of December 2005, 18 Indiana cities posted their ordinances to this website.

⁵⁶ [MCHD](#) is a division of the Health and Hospital Corporation of Marion County, and has jurisdiction within the city of Indianapolis and throughout Marion County (Indianapolis and Marion County have a unified government, but there are four separate cities within the county that are not part of Indianapolis: Lawrence, Speedway, Southport and Beech Grove). MCHD has the authority to enforce the Housing Code in all parts of the county.

components must be kept in sound condition and good repair;

[Section 10-704](#): Lead-containing paint may not be applied [to exterior wood surfaces].

The [City of Indianapolis Code](#), which is separate from the Marion County Health Department Code, also addresses safety in housing. [Section 391-102](#) states that “No building, vehicle, structure, receptacle, yard, lot, premises, or part thereof, shall be made, used, maintained or operated in the city in any manner so as to cause or produce a nuisance or be dangerous or detrimental to the public health and safety.” [Section 575](#) addresses Environmental Public Nuisances. In [Section 575-1](#), it states that its purpose is to make it “unlawful for property owners and occupants to allow an environmental public nuisance to exist.” In [Section 575-2](#), it defines “environmental public nuisance” to include “Property which has accumulated litter or waste products, unless specifically authorized under existing laws and regulations, or which has otherwise been allowed to become a health or safety hazard.” [Section 575-3](#) states that all owners and occupants of private property “shall be required to keep the private property free from environmental nuisances,” and [Section 575-4](#) states that “it shall be unlawful for a property owner or occupant to allow an environmental public nuisance to exist.” These provisions of the Indianapolis Code are enforced by the Department of Public Works.

As a practical matter in Indianapolis, issues of safe housing and, in particular, lead hazards, are routinely handled by the MCHD, which uses its enforcement authority to order landlords and property owners to address lead hazards when they have been discovered through an inspection. [Appendix D](#) includes various documents related to a code enforcement action by the Marion County Health Department when a property owner has failed to comply with an order directing correction of Housing Code violations.^{57, 58} The City Code does also appear to provide a basis for action, however.

ii. Examples of other County or City Codes.

The [Code of the Town of Griffith](#) states:

Any owner, tenant or resident who fails to maintain a house, building, structure or real estate shall be in violation of this section if the lack of maintenance results in any of the following:

- (1) Structural deterioration rendering the house, building, structure, sign or fence unsafe....
- (3) The existence of any condition conducive to the propagation of illness or disease...

⁵⁷ These documents include an initial letter notifying a property owner of the presence of lead hazards and ordering remediation; a notice of administrative hearing; Final Order after hearing; a complaint; and an Agreed Judgment.

⁵⁸ In Marion County, these cases are brought in Environmental Court and are almost always resolved through an Agreement for Judgment that establishes a compliance schedule. Amy Jones, the attorney who represents the Marion County Health Department in these cases, indicated that she was not aware of any case brought for alleged lead paint violations that was not resolved through an Agreement for Judgment. Telephone conversation with Amy Jones, December 22, 2005.

(8) A window or door that is not weathertight, water proof, rodent proof or is not in good repair.

(9) An inside or outside stair, porch, and appurtenance thereto that is unsafe or not capable of supporting the load that normal use may cause to be placed thereon.

[Section 14-302 \(2005\)](#) (Article VI)

In Fort Wayne, the [Fort Wayne-Allen County Health Department](#) manages the childhood lead poisoning prevention program. However, it is the Ft. Wayne city code that addresses conditions in housing that can create lead hazards. For example, [Ordinance 152-31](#) states that a building is “unsafe” “whenever a building or structure, used or intended to be used for residential or nonresidential purposes because of inadequate maintenance, dilapidation, decay, damage, faulty construction or arrangements, inadequate light, air or sanitation facilities or otherwise is determined by the enforcement authority to be unfit for human occupancy, to be unsanitary or in such a condition that is likely to cause sickness or disease.” [Section 14-204](#) of the City’s Housing and Building Standards requires that indoor ceilings or walls with “loose or deteriorated paint” must be repaired to a “smooth and sanitary condition.” This language provides good legal authority to require repair of dangerous lead paint conditions, however the code can be enforced only by the City of Ft. Wayne, not by the Fort Wayne-Allen County Health Department.

3. *The Indiana Unsafe Building Law*

Indiana law authorizes county governments to adopt safe building and minimum housing standards for unincorporated areas in county ordinance. [IC 36-7-8](#). Establishment and enforcement of those standards are addressed in [IC 36-7-9](#). An “unsafe building” is one that is “in an impaired structural condition that makes it unsafe to a person or property ...[or] a hazard to the public health.” [IC 36-7-9-4](#). Counties may issue orders requiring repair or, if conditions warrant it, that the property be vacated. [IC 36-7-9-5](#). This enforcement tool is available to Marion County and to any other county that has adopted the provisions of [IC 36-7-9](#) through county ordinance. [IC 36-7-9-1](#).

4. *Unfair or Deceptive Trade Practices*

Indiana’s Consumer Protection Statute⁵⁹ states that it is a “deceptive practice” for a supplier (defined in the statute to include a lessor) to represent that the “subject of a consumer transaction [defined in the statute to include leases] has . . . characteristics . . . use, or benefits it does not have which the supplier knows or reasonably should know it does not have” and that the “subject of a consumer transaction is of a particular standard, quality, grade, style or model, if it is not and if the supplier knows or reasonably should know that it is not.”⁶⁰

⁵⁹ [IC 24-5-0.5-1](#).

⁶⁰ [IC 24-5-0.5-3\(1\) and \(2\)](#).

Although we are aware of no cases in Indiana where this statute was the basis for a legal claim regarding lead-based paint, other states have considered this type of claim. Some have found that consumer protection laws similar to Indiana's provide a basis for a claim by a tenant regarding lead hazards,⁶¹ while some have found that they do not.⁶² Note, however, that consumer protection statutes do vary from state to state.

5. Common Law

Certain concepts of common law have been used in states other than Indiana as the basis for claims for damages for children who have been poisoned by lead hazards in rental property. **Negligence** is probably the most commonly used. Plaintiffs have alleged that landlords had a duty to keep the rental premises in proper repair and that the presence of lead hazards constituted an unreasonably dangerous hazard for which the landlord is liable. There are no reported cases in Indiana, but several courts in other states have found in support of tenants in these claims, finding that the landlords' continuing control of the premises meant they should have been aware of the hazard, or citing health and building codes as establishing a duty.⁶³ Other courts have found that landlords must receive actual notice of hazards before a duty is created.⁶⁴ It always strengthens the tenant's case if they have given notice to the landlord about the presence of lead hazards.

Tenants have also based actions on **breach of contract** in cases where the landlord agrees to address lead-based paint and either does not do it or does it improperly.

Indiana's statutory nuisance law provides that "whatever is injurious to health or offensive to the sense so as to essentially interfere with the comfortable enjoyment of life or property is a **nuisance** subject to legal action."⁶⁵ An action to abate the nuisance may be brought by any person whose: (1) property is injuriously affected; or (2) personal enjoyment is lessened by the nuisance."⁶⁶ The remedy for a proven nuisance claim is an order that the nuisance be enjoined or abated and damages recovered for the nuisance. [IC 32-30-6-8](#). Indiana case law supports an argument that a property

⁶¹ That is, renting premises with lead hazards without disclosing them to the tenant constitutes a deceptive trade practice. See, for example, Hardy v. Griffin, 41 Conn. Supp. 283, 569 A2d 49 (1989)

⁶² See, for example, Underwood v. Risan, 414 Mass. 96, 605 NE2d 832 (1993).

⁶³ See, for example, Brooks v. Lewis Realty III, Inc., 378 Md. 70, 835 A.2d 616 (2003); Espinal by Castillo v. 570 W. 156th Assoc., 174 Misc. 2d 860, 667 NYS 2d 223, 123 Ed. Law Rep. 847 (Sup. Ct. 1997) (in case of building built before 1960, notice to the landlord of peeling paint created rebuttable presumption that landlord had notice of lead-based paint hazards and had duty to abate the hazard).

⁶⁴ See, for example, Brown v. Paul, 736 NYS 2d 415 (App. Div. 2d Dep't. 2002) (Tenant must show that landlord had actual or constructive notice hazards and an opportunity to remedy).

⁶⁵ [IC 32-30-6-6](#).

⁶⁶ [IC 32-30-6-7](#).

owner who leases premises on which there is a nuisance, or which would create a nuisance in their normal usage, is liable for injuries resulting from the nuisance.⁶⁷

6. Waste Laws

EPA has declared that lead-based paint debris from residences is “household hazardous waste.” Household hazardous waste it is not subject to federal and state requirements for the storage, handling and disposal of hazardous waste established by the Resource Conservation and Recovery Act,⁶⁸ but instead is considered regular solid waste for purposes of handling and disposal.⁶⁹ In two cases of property heavily contaminated with lead dust and lead-based paint debris (one commercial and one residential), EPA brought administrative actions against the property owners alleging violations of RCRA.⁷⁰

In [Order to Group I Management and M275](#), USEPA Docket No. RCRA-01-2001-0072 EPA found that lead paint dust is “solid waste” within the meaning of RCRA and poses an imminent and substantial endangerment to human health. The Property Owners agreed to abate lead hazards at the property in settlement of these claims.⁷¹ [Appendix D](#) includes a copy of EPA’s Order in this case.

Thus, as interpreted by EPA, the solid waste provisions of RCRA provide a legal basis for requiring cleanup. RCRA provides a way for citizens themselves to bring claims similar to the one described above. After providing 90 days advance notice to EPA, the state and the property owner, any person may commence an action against a person “who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.”⁷²

⁶⁷ [Walker v. Ellis](#), 129 N.E. 2d 65, 72 (Ind. App. 1955). See also, [Groff v. City of Butler](#), 794 N.E. 2d 528 (2003) (property owner whose rental properties were ordered demolished by City Housing Department had created a nuisance within the meaning of IC 32-30-6-6). And in [Friendship Farms Camp, Inc. v. Parson](#), 359 N.E. 2d 280 (Ind. App. 1977), the court made clear that there does not need to be actual physical illness before a nuisance can be found. Therefore, a tenant need not wait until a child is lead poisoned to bring a claim for nuisance. Other cases applying the nuisance statute include [Sherk v. Indiana Waste Systems, Inc.](#), Ind. App., 495 N.E. 2d 815, 818 (1986) (“When deciding whether one’s use of his property is a nuisance to his neighbors, it is necessary to balance the competing interests of the landowners, using a common sense approach.”); [Rust v. Guinn](#), 429 N.E. 2d 299, 304 (1981) (elements of damage include the loss of value of the property, as well as the value of personal discomfort, inconvenience, or “any injury to health or other personal injury sustained by the plaintiff, or by members of his family.”).

⁶⁸ [42 USC 6901 et seq.](#)

⁶⁹ EPA addresses this issue in a helpful guidance document: [RCRA in Focus: Construction, Demolition and Renovation](#) at 8 (2004).

⁷⁰ The actions were brought under [42 USC 6973\(a\)](#), which authorizes EPA to bring suit where there is “an imminent and substantial endangerment to health or the environment.”

⁷¹ See also [In the Matter of 17th Street Revocable Trust](#), EPA Docket No. RCRA-2—0001TH, where EPA stated that deteriorating paint continually creates lead-paint based wastes and that the property owners, by failing to eliminate the deteriorating paint, are contributing to the past and present handling, storage, treatment and disposal of solid waste.

⁷² [42 USC 6972\(a\)\(1\)\(B\)](#).

The remedy is limited to cleanup of the hazards (not damages or penalties), though the prevailing party may recover attorney and expert witness fees.⁷³

7. IDEM's Authority in Cases of Substantial Endangerment to the Public Health

If the Commissioner of IDEM receives information that a source of pollution is presenting an imminent and substantial endangerment to the “health of persons,” [IC 13-14-10-2](#) requires that he or she bring suit to restrain any person causing or contributing to the alleged pollution to stop the introduction of contaminants that are causing or contributing to the alleged pollution and take other necessary action. Receipt of information that lead hazards exist or, worse yet, that a child has an elevated blood lead level in a home with identified lead hazards would trigger this requirement.⁷⁴ As of this writing, IDEM has not taken any actions under this provision to address lead hazards.

8. How and Where to Bring a Claim

The statutes, codes and common law theories discussed above provide several mechanisms for enforcement of safe housing requirements by either government agencies or individuals. City and County Health or Housing Departments are generally authorized to issue orders to property owners to address unsafe conditions and proceed to enforce those orders in an administrative forum and, if necessary, the local court. The IDEM Commissioner has authority in cases of substantial and imminent endangerment to the public health. Federal agencies can bring enforcement actions under several statutes. These types of actions are addressed specifically in Chapter V—the Role of Government. This section will address the rights of tenants and landlords to take legal action to address lead hazards in housing.

Under Indiana’s rental housing law discussed above,⁷⁵ both landlords and tenants have the right to take the other party to court for violations of the requirements. A tenant may bring an action against his or her landlord after giving the landlord notice of the problem, a reasonable opportunity to address the situation (and the tenant may not deny the landlord access to the rental unit in order to make repairs), and the landlord has refused or failed to address the problem.⁷⁶ A tenant who prevails in an action may recover actual and consequential damages, attorney’s fees and costs, injunctive relief and any other appropriate remedy.⁷⁷ A tenant may also raise claims

⁷³ [42 USC 6972\(e\)](#).

⁷⁴ IDEM does not currently have access to confidential information about the identity and residence of children with elevated blood lead levels, but information presented to the department would provide a basis for action under this provision.

⁷⁵ [IC 32-31-8](#).

⁷⁶ [IC 32-31-8-6](#).

⁷⁷ A common concern among tenants is that landlords will try to evict tenants who raise concerns, either formally or informally, about lead hazards or will simply refuse to rent to families with children. There is no doubt that this happens, and Indiana does not have a law prohibiting retaliatory eviction. [confirm]. However, Indiana Fair

about poor housing conditions and the landlord's failure to comply with lead paint disclosure requirements in response to an eviction proceeding. [Appendix D](#) includes a sample Answer and Counterclaim filed by a tenant in an eviction proceeding.

A landlord may bring a suit against a tenant if he or she has given the tenant reasonable notice of the noncompliance and an opportunity to remedy it.⁷⁸ A prevailing landlord may recover actual costs, attorney fees and court costs, and seek injunctive relief.

Indiana does not have a court that deals specifically with housing issues, so a complaint under this law should be brought in the local circuit, superior, or county court. If the amount of damages being sought is less than \$3000, then the case qualifies as a "small claims" case, and should be brought in the small claims court of the county, if one exists separately from the circuit or superior court. In Marion County, a complaint may be filed in the Environmental Division of the Superior Court or in the Small Claims court in the township where the property is located (if damages are less than \$6000).⁷⁹

Case law on lead paint in landlord/tenant cases. There are no Indiana appellate decisions that address lead hazards under this law. The Marion County Environmental Court has issued orders to landlords requiring abatement of lead hazards, though cases are generally brought by the Marion County Health Department enforcing the Housing Code (not by a tenant) and are resolved through an Agreed Order. See [Appendix D](#) for copies of a standard Complaint and Agreed Order in Marion County Environmental Court.

However, courts in other states have found that conditions of lead hazards in housing that violate Health or Housing Code requirements that housing be maintained in a "habitable condition" provide the basis for a lawsuit under rental housing laws that also require the housing be maintained in a habitable and safe condition.⁸⁰

Housing Law does provide that a landlord cannot discriminate against a tenant because he or she has children. [IC 22-9.5-5](#).

⁷⁸ [IC 32-31-7-7](#).

⁷⁹ See <http://www.in.gov/judiciary/marion/> for more information about the Marion County court system, including contact information for the Environmental Court.

⁸⁰ See, for example, [Richwind Joint Venture v. Brunson](#), 335 Md. 661, 645 A2d 1147 (1994); [Antwaun A. v. Heritage Mutual Insurance Co.](#), 228 Wis. 2d 44, 596 NW2d 456 (1999).

C. Additional Requirements for Publicly Assisted Housing

1. Requirement to Inspect and Abate

Recognizing that lead poisoning would not be eliminated without addressing the main source of exposure—lead-based paint in housing—Congress took responsibility with respect to the housing stock it controlled in some way (either through direct ownership, subsidy of rents, loans for rehabilitation or other similar programs) and enacted the [Lead-Based Paint Poisoning Prevention Act](#), 42 U.S.C. 4821 et seq. and the [Residential Lead-Based Paint Hazard Reduction Act](#), 42 U.S.C. 4851 et seq. These laws set forth a program to eliminate lead-based paint hazards in federally funded housing. Federally funded housing built before 1960 was to be inspected for lead-based paint and interim controls implemented by 1996. Housing built between 1960 and 1978 was to be inspected and interim controls applied no later than 2002.⁸¹

2. When a Child Has Been Lead Poisoned

HUD's regulations require that upon notification by a public Health Department or other medical health care provider that a child younger than 6 has been identified as having a blood lead level over what is known as the "environmental intervention blood lead level,"⁸² the owner shall complete a risk assessment of the dwelling unit in which the child lived at the time her or his blood was last sampled and of the common areas serving that dwelling unit. If the risk assessment reveals lead hazards, the owner must either abate or use interim controls to reduce the lead hazards.⁸³ These requirements apply even if the child is no longer living in the home, as long as the property is still federally subsidized.

D. Other Health Hazards Found in the Home

In addition to lead-based paint, there can be other environmental hazards in the home that can cause health problems. It is not the purpose of this book to address these issues in detail, but we will note them here briefly.

1. Asbestos

Asbestos and asbestos-containing materials were extensively used as insulating and fire retardant materials during the 19th and 20th centuries. Asbestos can still be found on piping, furnaces, and in floor and ceiling tile. If asbestos-containing material is

⁸¹ Several types of housing are subject to one or more of the requirements of these programs (for example, public housing, Section 8 housing, HUD-owned housing, housing receiving federal rehabilitation grants). More detail about the types of housing covered and the specific requirements are set forth in HUD's implementing regulations, [24 CFR 35](#).

⁸² A concentration ≥ 20 micrograms/deciliter for a single test or 15-19 micrograms/deciliter in two tests taken at least three months apart.

[24 CFR 35.110](#).

⁸³ [24 CFR 35.730](#).

in good condition, i.e. not “friable” (crumbly or deteriorating), it poses no health risk and should not be disturbed. If it is friable, however, it should be removed by a properly trained and licensed asbestos removal contractor under conditions that will ensure no exposure. The asbestos waste must also be handled carefully and in accordance with state and federal requirements. For more information about asbestos, see <http://www.epa.gov/asbestos/> and <http://www.in.gov/idem/air/compliance/index.html#A>.

2. Radon

Radon is a naturally occurring, colorless and odorless gas that is present in approximately 30% of homes in Indiana. Radon gas is created as a result of the breakdown of uranium in the soil; the radioactive particles can damage lung tissue. Exposure to radon is the leading cause of lung cancer among non-smokers and can increase a smoker’s chance of getting cancer substantially.⁸⁴ Radon seeps into the basements of homes through the foundation and remains primarily in the basement or first floor. The only way to know if your house has excessive levels of radon is to test it, using a commercially available test kit or a licensed tester. If levels are higher than 4 pico Curies per liter, EPA recommends that a radon mitigation system can be installed to ventilate the home. Firms that install radon abatement systems or test for radon must be licensed by the Indiana State Department of Health. There is additional information about radon on the EPA, ISDH and Marion County Health Department websites.⁸⁵

3. Carbon Monoxide

High levels of carbon monoxide can occur in the home from improperly vented appliances, the presence of vehicle exhaust, wood burning, and other sources. Carbon monoxide is colorless and odorless but can have very serious health impacts, including death. Carbon monoxide monitors are widely available and should be encouraged in all housing. For more information about carbon monoxide, see <http://www.epa.gov/iaq/co.html>.

4. Moisture and Mold

Problems associated with mold in housing are becoming increasingly prominent. Excess moisture, which can be the result of improper construction or maintenance, can easily lead to the growth of molds that can cause respiratory illnesses and other health problems. Many local housing or health codes explicitly require that houses be maintained so as to protect from water damage.⁸⁶ For more information about mold, see <http://www.epa.gov/mold/moldresources.html>.

⁸⁴ See www.epa.gov/radon/healthrisks.html.

⁸⁵ For additional information, see <http://www.epa.gov/radon/>, <http://www.in.gov/isdh/regsvcs/radhealth/radon.htm>, and <http://www.mchd.com/wqhmm.htm>.

⁸⁶ See, for example, Article 7 of the Housing and Environmental Standards Ordinance of [Chapter 10](#) of the Marion County Health Department.

5. Lead in Drinking Water

In some areas, lead levels in drinking water can be high because of lead in the pipes, either the pipes from the public water supply itself or, more likely, pipes leading from the public system to the home or in the home itself. Lead will not change the appearance or taste of your water and boiling will not remove it. If you think your plumbing might have lead in it, you can request the local health Department or water company to test the water. In addition, use only cold water for drinking and cooking and let the water run for at least 15 seconds before drinking it, especially if it has not been used for a few hours. For more information about lead in drinking water, see <http://www..gov/safewater/lead/index.html>.

6. Other Sources of Lead in the Home

In addition to paint and drinking water, there are other potential sources of lead in the home:

- * Older furniture, toys and other items that may be coated with lead-containing materials
- * Food and liquids stored in lead crystal or lead-glazed pottery or porcelain
- * Hobbies that use lead, such as making pottery or stained glass, or refinishing furniture
- * Folk remedies that contain lead, such as “greta” and “azarcon” used for upset stomach treatment
- * Lead brought into the home on the hands or clothes of a family member who is exposed to lead at work
- * A variety of other items, such as certain cosmetics, spices, ayurvedic medicines, candies and candy wrappers (imported from Mexico), miniblinds, candles, toys, and toy jewelry.⁸⁷

⁸⁷ The [Consumer Product Safety Commission](http://www.cpsc.gov/cpscpub/prerel/prerel.html) issues product warnings and provides other information and resources on consumer products that contain lead. Product recalls are available at <http://www.cpsc.gov/cpscpub/prerel/prerel.html>.

Rights and Responsibilities of Buyers and Sellers

Just as the [Residential Lead-Based Paint Hazard Reduction Act](#) and [Lead Hazard Disclosure Rule](#) require landlords to inform prospective tenants of any information about the presence of lead-based paint, a seller (or agent) must make similar disclosures to prospective buyers. [40 CFR 745.100 and 107](#). In addition, in the case of a sale, the seller must give the purchaser 10 days to conduct a risk assessment or lead-based paint inspection before the purchaser is obligated under a contract.⁸⁸ [40 CFR 745.110](#).

A buyer may bring an action under the federal disclosure law, the Indiana Consumer Protection Statute,⁸⁹ or under common law theories of fraud and breach of contract. Much of the law that applies to rental situations applies equally to the sale of property; please refer to the previous chapter for more discussion of these issues.⁹⁰

In December 2004, an Indiana homeowner brought an action against a realty company, real estate broker, her own real estate agent and others for failure to disclose lead hazards in the home she bought as required by HUD and EPA disclosure requirements. Her complaint alleged negligence on the part of the defendants who knew or should have known of the disclosure requirements, the dangers that lead-based paint poses to children, and that the plaintiff had young children. In a Third Count, the complaint alleged that the plaintiff's own real estate agent and broker had breached their contractual obligation to represent her interests during the purchase of the property. The tenant settled with all defendants. [Appendix D](#) includes a copy of the complaint.

[Indiana Property Transfer Disclosure Laws](#). Two Indiana statutes address disclosure requirements upon property transfers. Although we are familiar with no case where it has been an issue, both laws require a seller to disclose the presence of lead hazards to a potential buyer.

The [Residential Real Estate Sales Disclosure Act](#)⁹¹ applies to sales of residential property of four residential units or less. It requires the seller complete and give the potential buyer a disclosure form that addresses specified information about the condition of the property.⁹² The details of the disclosure form are contained in 876 IAC 1-4-2, and include disclosure of "hazardous conditions on the property, such as methane gas, lead paint, radon gas in house or well, radioactive material, landfill,

⁸⁸ The parties may agree on a different amount of time and/or the purchaser may waive the opportunity to conduct the inspection, which sellers frequently ask buyers to do. [40 CFR 745.110](#).

⁸⁹ [IC 24-5-0.5-1](#).

⁹⁰ The private right of action under federal statutes is explained thoroughly in "Private Civil Actions Under the Residential Lead-Based Paint Hazard Reduction Act of 1992" (2005), available at http://www.afhh.org/res/res_Operation_LEAP_toolkit_disclosure_Private_Causes_of_Action.htm.

⁹¹ [IC 32-21-5](#).

⁹² [IC 32-21-5-8](#).

mineshaft, expansive soil, toxic materials, mold, other biological contaminants, asbestos insulation, or PCBs.”⁹³

The [Responsible Property Transfer Law](#) applies to transfer of certain types of property (commercial, industrial, farm, and residential with at least six dwellings).⁹⁴ It requires disclosure of a variety of environmental conditions, including any “environmental defect.”⁹⁵

⁹³ [876 IAC 1-4-2](#), Question 3.

⁹⁴ [IC 13-25-3](#). [IC 13-11-2-174](#) defines what constitutes “property” for the purposes of this disclosure requirement.

⁹⁵ [IC 13-25-3](#). An “environmental defect” does not explicitly mention lead, but includes a “condition that . . . [p]resents a substantial endangerment to . . . [t]he public health.” [IC 13-11-2-70](#).

Cleaning Up the Hazard Maintenance and Repairs Where Hazards May Exist

Eliminating childhood lead poisoning cannot be done without addressing the lead hazards in Indiana's housing stock, which means evaluating housing for the presence of lead-based paint or lead-based paint hazards and then either abatement or interim controls in houses where they are found. Even where addressing lead hazards is not the main concern, remodeling and renovation activities frequently disturb lead-based paint, thereby creating lead hazards where there had perhaps previously been none or making them worse. Removing, covering up or disturbing lead-based paint *can* be done safely, but it requires awareness, training and commitment to using appropriate methods.

State and federal laws and regulations address these issues. This chapter will provide an overview of those requirements.

Key Terms. It is important first to understand some key terms as they are defined in federal and state regulations.⁹⁶

Abatement means any measure or set of measures designed to *permanently eliminate* lead-based paint or lead-based paint hazards. This means either complete removal of the paint (or the building components, such as doors and windows, that are painted) or permanent enclosure or encapsulation of the lead-based painted surfaces. The expectation is that permanent measures are those intended to be effective for at least 20 years.

It is crucial to understand that if the purpose of a project is anything other than permanent removal of lead-based paint or lead-based paint hazards as defined above, it is *not* considered abatement.⁹⁷ This distinction is critical, because many of the requirements apply only to abatement projects.

Interim controls means a set of measures designed to *temporarily reduce human exposure* or likely exposure to lead-based paint hazards. It includes specialized cleaning, scraping and repainting, and temporary containment. Interim controls are frequently an acceptable (and generally less expensive) way to address lead hazards.

⁹⁶ These definitions can be found at [326 IAC 23-1](#) (IDEM); [24 CFR 35.110](#) (HUD); and [40 CFR 745.223](#) (EPA). Additional terms are included in the Glossary, see Appendix A.

⁹⁷ The rules explicitly exclude from the definition of *abatement* “renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling.” [40 CFR 745.223\(4\)](#) and [326 IAC 23-1-2\(c\)\(1\)](#). For example, if a homeowner decides to remodel the kitchen and remove and replace all the wooden cabinets and other woodwork that has lead-based paint on it, the project would be considered a *renovation* for purposes of the regulations, not an *abatement*, because the purpose of the project is remodeling, not removal of lead-based paint. This is true even though the practical result is permanent removal of the lead-based paint.

Remediation means actions that constitute either abatement of a lead hazard or interim control of a lead hazard.

Renovation means the modification of any existing structure, or portion thereof, that results in the disturbance of painted surfaces unless that activity is performed as part of abatement.

Lead-based paint inspection means a surface-by-surface investigation to determine the presence of lead-based paint and the provision of a report explaining the results of the investigation. The purpose of an inspection is to identify lead-based paint, not to determine whether hazards exist.

Lead-safe work practices means certain types of activities to use (or to avoid) when disturbing lead-based paint. The point is to use techniques that will create a minimum of dust or release of lead particles to the air, clean up dust that may be created, and protect inhabitants. Lead safe work practices include warnings to residents, isolating the work area, proper handling of waste and cleanup techniques. Paint removal activities to avoid include:

- open flame burning or torching;
- machine sanding or grinding without high efficiency particulate air local exhaust control;
- abrasive blasting or sandblasting without high efficiency particulate air local exhaust control;
- use of a heat gun that operates above 1,100 F or chars the paint;
- dry scraping under most circumstances; and
- dry sanding under most circumstances.

Risk assessment means an on-site investigation to determine the existence, nature, severity and location of lead-based paint hazards and the provision of a report explaining the results of the investigation and options for reducing lead-based paint hazards. Any description of the specific hazards is a risk assessment.

Target housing means housing constructed before January 1, 1978, except: (1) housing for the elderly or individuals with disabilities that is not occupied by or expected to be occupied by a child six years of age or younger and (2) zero-bedroom dwellings.⁹⁸

A. When is Abatement Required?

Abatement is required by law only in very specific circumstances. The key federal statutes require lead paint inspections of a variety of types of housing that are federally owned or subsidized in some way, and require abatement in certain situations. HUD's regulations detail the requirements for the various types of housing.⁹⁹ Because

⁹⁸ A zero-bedroom dwelling means a residential dwelling in which the living area is not separated from the sleeping area, for example, studio apartments, dormitories, barracks or single room occupancy buildings. 40 [CFR 745.102](#).

⁹⁹ See [24 CFR 35](#).

interim controls are generally less costly than abatement and can be very effective, local health Departments typically require remediation of hazards, but not necessarily full abatement.

Another situation in which abatement is required is in projects conducted in response to federal, state, or local abatement government orders or court orders.¹⁰⁰ When asking a court for clean up of property as part of the remedy, advocates should be clear on whether they are asking for full abatement or remediation, which could include interim controls. And courts should be clear on what they are requiring when they issue orders.

B. Requirements for Abatement and Pre-Abatement Activities

Federal and state law require that lead abatement projects must be performed by those who are trained and licensed to do lead-based paint work.¹⁰¹ In Indiana, the licensing program is run by the Indiana Department of Environmental Management, Office of Air Quality, [Asbestos and Lead Section](#). What, and who, exactly does this cover?

1. Inspections and Risk Assessments

In order to conduct a lead inspection or risk assessment, you must hold a license from IDEM. Licensing requires completion of a training course offered by an IDEM certified training facility and passing an exam administered by IDEM.

2. Abatement Activities

Anyone who participates in lead-based paint abatement activities must have taken the appropriate training course for the discipline in which they seek to be licensed, passed the IDEM exam and received a license from IDEM. Specific licensing disciplines include Project Designer, Supervisor, Worker, and Contractor.¹⁰² The licensing requirement does not apply to property owners who do abatement activities on their own property.

¹⁰⁰ [40 CFR 745.223\(3\)\(iv\)](#).

¹⁰¹ The Lead-Based Paint Hazard Reduction Act of 1992 directed EPA to promulgate regulations to ensure that individuals engaging in lead-based paint activities are properly trained; that training programs are accredited; and that contractors engaged in such activities are certified. [42 USC 4852c](#). The regulations must contain standards for performing lead-based paint activities, taking into account reliability, effectiveness, and safety, and must require that all risk assessment, inspection, and abatement activities performed in target housing be performed by certified contractors. EPA's regulations are found at [40 CFR 745.220 et seq](#). Indiana implements this program through [IC 13-17-14](#) and [326 IAC 23](#). (Because Indiana has adopted the federal regulations in their entirety, this book will cite primarily to the state rules.)

¹⁰² After abatement is completed, the property must be inspected for the presence of any remaining lead paint debris or dust. This activity can be done by a person licensed as a Clearance Examiner. [326 IAC 23-1-7.6](#).

Persons engaged in abatement activities must provide notice to IDEM two working days prior to the beginning the abatement activities¹⁰³ and must follow prescribed procedures to assure safe removal of lead-based paint and safe disposal of waste.¹⁰⁴

Before beginning abatement work, the contractor must prepare a written “occupant protection plan” unique to each residential unit or child-occupied facility. This plan must describe the measures that will be taken during the abatement project to protect the building occupants from exposure to lead hazards.¹⁰⁵

Part of an abatement project is a clearance exam to assure that no lead paint debris or dust remains above EPA’s prescribed levels. See Section C.3 below.

Because Indiana law has no affirmative obligation to abate lead-based paint hazards and because of the strict definition of “abatement,” there have been relatively few abatement projects in Indiana.¹⁰⁶ In other states, however, there have been many more abatement projects and enforcement actions to address violations of work practice, notification and other requirements.

C. Renovation or Remodeling Projects

1. Notice to Owner and Occupant

Renovation and remodeling projects are not considered “abatement” and therefore the training and licensing requirements do not apply. However, federal and state law require that anyone who performs a renovation of target housing for compensation must provide a lead hazard information pamphlet to the owner and occupant (if not owner-occupied) no sooner than 60 days before commencing the renovation.¹⁰⁷ EPA has published a [pamphlet](#) that satisfies the requirements of this provision—the same pamphlet used by sellers or lessor to comply with the disclosure requirements.

The renovator must obtain [written acknowledgement](#) from the owner and occupant of receipt of the pamphlet, include the acknowledgement as part of the contract or written service agreement, and keep records for at least three years after completion of the project. If the renovator cannot obtain written acknowledgement, he or she can certify in writing to delivery of the pamphlet or send the information to the owner and occupant by certified mail.¹⁰⁸ Failure to comply with these provisions is a

¹⁰³ [326 IAC 23-4-6](#) and [40 CFR 745.227\(e\)\(4\)](#).

¹⁰⁴ [326 IAC 23-4-5](#).

¹⁰⁵ [326 IAC 23-4-5\(4\)](#) and [40 CFR 745.227\(e\)\(5\)](#).

¹⁰⁶ In 2003-5, IDEM received 16 notices of abatement projects.

¹⁰⁷ [15 USC 2686\(b\)](#); [40 CFR 745.80 – 88](#); [326 IAC 23-5-2\(e\)](#).

¹⁰⁸ [40 CFR 745.85\(a\)\(2\)](#).

violation of the Toxic Substances Control Act, subject to a civil penalty of up to \$25,000 per violation and criminal sanctions as well.¹⁰⁹

Small projects that will disturb less than 2 square feet of paint per building component do not require this notification.¹¹⁰

2. Work Practice Standards

There are currently no federal requirements for work practice standards in renovation or remodeling work, despite the fact that [15 USC 2682\(c\)\(3\)](#) required that such rules be developed by 1996. EPA has recently begun a rulemaking process, however, and in January 2005, published a proposed rule.¹¹¹

However, in 2002, the Indiana General Assembly added progressive requirements to Indiana's lead-based paint law that prohibit the use of certain dangerous paint removal techniques in nearly all projects that disturb lead-based paint, even if the project is not abatement. [IC 13-17-14-12](#), added by P.L. 99-2002. Significant provisions of this law are that:

- it does not apply to an owner working on his or her own property *unless* the property is occupied by someone other than the owner or a member of the owner's family (i.e. a tenant) or a child under 7 with an elevated blood level;
- it creates a presumption that paint in housing built before 1960 is lead-based paint unless it has been determined not to be through a lead paint inspection;
- it prohibits specific work practices that are likely to create dust or airborne lead;¹¹² and
- it requires that all visible paint chips or other debris on any exterior surfaces be cleaned within 48 hours.

The statute does not specify which agency has enforcement authority for these provisions, however IDEM has incorporated these provisions into its lead rules at [326](#)

¹⁰⁹ See [15 USC 2689 and 2615](#).

¹¹⁰ [40 CFR 745.82\(b\)\(2\)](#).

¹¹¹ More information is available at <http://www.epa.gov/lead/pubs/renovation.htm>, and the proposed rule is available at [17 FR 1587](#).

¹¹² Prohibited paint removal activities include:

- open flame burning or torching;
- machine sanding or grinding without high efficiency particulate air local exhaust control;
- abrasive blasting or sandblasting without high efficiency particulate air local exhaust control;
- use of a heat gun that operates above 1,100 F or chars the paint;
- dry scraping under most circumstances; and
- dry sanding under most circumstances.

[IAC 23-5-2](#). In 2003, IDEM issued a Violation Letter¹¹³ to a property owner in Fort Wayne for failure to clean up chips and other debris during a renovation. The letter directed the property owner to clean up all paint debris within two days. It took several reinspections by IDEM inspectors and the local Health Department and more aggressive enforcement action by IDEM before the property owner cleaned up the debris and, ultimately, entered into an Agreed Order that involved payment of a penalty. [Appendix D](#) includes documents related to this proceeding.

3. Making Sure It Has Been Done Right

Abatement activities require what is called “clearance.” Clearance must be done by a licensed risk assessor or inspector and starts with an initial visual inspection to determine whether any visible dust or paint debris remains. Then, the risk assessor or inspector must conduct dust sampling, using dust wipes following specified procedures, to verify that no dust remains in excess of federal limits.¹¹⁴

There is no clearance requirement for renovation or remodeling projects. In its proposed [Renovation and Remodeling rule](#), EPA has proposed something called the “white glove” test, where the contractor will compare dust wipes to a card prepared by EPA. Research shows that clearance procedures based on visual methods are not very effective and result in too much lead dust remaining in the home.¹¹⁵ Indiana rules provide for licensing of Clearance Examiners, who are trained to verify the proper completion of interim controls, but not abatement activities.¹¹⁶ Many HUD remediation projects involve interim controls rather than abatement, which can be verified by a Clearance Examiner.

D. Disposal of Lead Paint Waste

1. Lead Paint Debris from Homes is “Solid,” not “Hazardous,” Waste

EPA has declared that lead-based paint debris from residences is “household hazardous waste,” and therefore may be disposed of as regular solid waste, rather than being subject to the more stringent requirements that apply to hazardous waste under the Resource Conservation and Recovery Act.¹¹⁷ Indiana’s solid waste laws, therefore, apply to lead-based paint debris from residential activities.¹¹⁸

¹¹³ A Violation Letter is a notice that violations of statutes or regulations appear to be occurring and is often the first step taken by IDEM Compliance offices. It is not considered formal enforcement action, but often is sufficient to bring a party back into compliance.

¹¹⁴ [40 CFR 745.227\(e\)\(8\)](#).

¹¹⁵ [71 Fed. Reg. 1588, 1613](#) (January 10, 2006).

¹¹⁶ [326 IAC 23-1-7.5 and 7.6](#).

¹¹⁷ See [RCRA in Focus: Construction, Demolition and Renovation](#) at 8 (2004).

¹¹⁸ Though not required, EPA does encourage owners and contractors to use best management practices for handling the waste, for example: collecting paint chips, dust, dirt and rubble in plastic trash bags for disposal; sorting large structural components with lead-based paint in containers until ready for disposal; using a covered mobile dumpster

Lead-based paint debris from commercial and other non-residential buildings must be disposed of as Construction/Demolition waste. It may also be considered hazardous waste subject to the requirements of the Resource Conservation and Recovery Act.

2. *Open Burning Prohibited*

Indiana law prohibits open burning of lead paint contaminated material.¹¹⁹

3. *How to Handle and Dispose of Lead Paint Debris*

IDEM issued a guidance document on January 15, 2001, "[IDEM Managing Lead-Based Paint Waste, OLQ General ID120096](#)",¹²⁰ describing how and where lead paint wastes should be disposed of. "Concentrated" waste (chips, dust, scrapings, flakings, etc. from lead paint activities) may be disposed of in a municipal solid waste landfill. Structural elements contaminated with lead-based paint (for example, doors or windows that have been removed during remodeling) should be disposed of in a landfill licensed by IDEM to accept construction and demolition debris. Leaving waste uncollected in a building or disposing of it anywhere other than in a permitted landfill is prohibited.

E. Enforcement and Private Rights of Action

1. *Enforcement in Abatement Projects*

Violation of the licensing and work practice requirements for abatement projects is a violation of both federal law¹²¹ and state law¹²² and may be enforced by EPA or IDEM. Since EPA has delegated implementation of the program to IDEM, however, IDEM is the primary agency for compliance and enforcement activities. The Resource Conservation and Recovery Act and the Toxic Substances Control Act provide for civil and criminal sanctions.¹²³ Indiana law authorizes the Commissioner of IDEM to enjoin work on an abatement project that is not being performed in accordance with the rules without prior notice or hearing.¹²⁴

for storage of debris until completion of the job; and contacting city or county offices to determine where and how the debris may be disposed of.

¹¹⁹ [IC 13-17-9](#); [326 IAC 4-1-2](#).

¹²⁰ See <http://www.in.gov/idem/land/hazwaste/guidance/mangleadbasedpaints.pdf>.

¹²¹ [15 USC 2689](#); [40 CFR 745.233](#).

¹²² [IC 13-17-14-3](#); [326 IAC 23-2-1](#).

¹²³ [15 USC 2615](#); [42 USC 6973](#).

¹²⁴ [IC 13-17-14-10](#).

Failure to comply with the Indiana law or rules is also a basis for civil or criminal enforcement (a Class D felony).¹²⁵ In an emergency situation, IDEM or the Indiana Attorney General could proceed directly to court (Environmental Court in Marion County, Superior or Circuit Court in other Indiana counties), although IDEM is more likely to proceed through the administrative enforcement process, especially if dangerous activity has ceased.

2. Enforcement in Renovation Projects

Violation of the requirement that renovators provide the informational pamphlet to owners and occupants is a violation of TSCA and Indiana law and may be enforced by EPA and IDEM under the provisions discussed above. In 2005, EPA took the first enforcement action against a contractor for failure to provide the lead pamphlet before a renovation project, one that resulted in a child becoming lead poisoned from lead dust and debris.¹²⁶

3. Citizens' Rights of Action

The public has the right under both state and federal law to bring an action for violations of the lead-based paint requirements covering licensing, notification and work practice requirements in abatement or renovation situations.

a. Federal Law. The citizen's suit provision of TSCA provides that any person may bring an action in federal court against any person alleged to be in violation of a provision of TSCA or an action against the Administrator of EPA to compel a nondiscretionary act.¹²⁷ The plaintiff must give the alleged violator and EPA 60 days notice of intent to sue.¹²⁸ The plaintiff may seek injunctive relief, attorneys fees and costs.¹²⁹

¹²⁵ [IC 13-30](#). IC 13-30-4-1 states that IDEM may seek civil penalties up to \$25,000 per day of violation and an order enjoining the action. And IC 13-30-6-1 says that knowing, intentional or reckless violation of environmental laws or regulations is a Class D felony, punishable by fines and/or imprisonment.

¹²⁶ The company, Virginia-based Millennium Quests, Inc., did not provide homeowners with required information about lead-based paint hazards before renovating their home in 2003. One of the homeowners' children was found to have an elevated blood lead level following the renovation, and the local health department found lead dust and lead-based paint chips throughout the family's home. The health department ordered the company to clean up the lead hazards, but the company failed to comply with the order in a timely manner. This, in turn, forced the family to hire another contractor to perform the cleanup, at a cost of over \$34,000. The family was eventually forced to sell the home. EPA's complaint proposes a penalty of \$27,500 for failing to disclose potential lead hazards. The State of Virginia has already fined the company \$8,000 and has revoked the company's Contractor License, and the local health department fined the company \$1,500. The family affected also won a \$1.3 million judgment against the company, which has now filed for bankruptcy. See http://www.afhh.org/res/res_alert_archives_oct05.htm#prerenovruleenforced.

¹²⁷ [15 USC 2619\(a\)](#).

¹²⁸ [15 USC 2619\(b\)](#).

¹²⁹ [15 USC 2619\(c\)](#).

b. State Law. [IC 13-30](#) is the Indiana law that provides for enforcement of the state's environmental laws. Section 1 states that the attorney general, a local government, or a citizen may bring an action for declaratory and equitable relief against a party for the protection of the environment of Indiana from significant pollution, impairment, or destruction. IC 13 does not define "environment." Although the majority of IDEM's programs address pollution in the ambient environment, given the inclusion of lead-based paint requirements in the Environmental Statutes, there is no reason to think that "environment" refers exclusively to the *outdoor* environment. The petitioner must give notice to IDEM, the Department of Natural Resources and the Indiana Attorney General before commencing the action.¹³⁰ If the agency with jurisdiction over the activity does not commence and diligently pursue an administrative or judicial proceeding to address the issue, the plaintiff may proceed with an action in court.¹³¹ If the plaintiff makes a *prima facie* case that the defendant has or is reasonably likely to impair, pollute or destroy the environment, the defendant may show that he or she is in compliance with an applicable environmental rule or, if there is no applicable rule, that there is no feasible and prudent alternative and the conduct, program, or product at issue is consistent with and reasonably required for the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of the environment from pollution, impairment, or destruction.¹³² If the defendant makes this *prima facie* defense, the case proceeds to the evidence phase. [any laws?] The case should be brought in the circuit or superior court of the county in which the alleged pollution is occurring.¹³³ There is no provision in the law for the award of attorneys fees; the only relief available is injunctive.¹³⁴

¹³⁰ [IC 13-30-1-2.](#)

¹³¹ [IC 13-30-1-3.](#)

¹³² [IC 13-30-1-8.](#)

¹³³ [IC 13-30-1-9.](#)

¹³⁴ [IC 13-30-1-11.](#)

The Role of Government

Although the sections above illustrate that there are many legal options available to tenants and property owners to address lead paint hazards, the fact is that most enforcement actions are initiated by government agencies. This section summarizes the basic authorities of local, state and federal government agencies. Individuals should not hesitate to contact government officials for assistance in dealing with lead-based paint, especially when a child has been lead poisoned.

A. What Does Local Government Do?

1. Local Health or Housing Departments

The local Health or Housing Department is generally the most accessible agency to tenants and homeowners, and best equipped to address both the health and housing needs of families within its jurisdiction.

a). *Blood Lead Testing.* Many local Health Departments offer free blood lead testing for children ages 6 and under or can direct families to clinics that do blood tests.¹³⁵

b). *Education.* Many local Health Departments provide educational materials about lead poisoning through ongoing programs and at health fairs and other special events.¹³⁶ Health Departments also work to educate physicians and others in the health care professions about the importance of screening, recognition of symptoms of lead poisoning and treatment.¹³⁷

c). *Case Management.* Once a child is found to have an elevated blood lead level, Health Departments provide case management services to determine the source of lead exposure and work with the family to reduce or eliminate the exposure.¹³⁸

d). *Housing Inspections and Orders.* Local Health or Housing Departments conduct inspections to determine whether there are violations of local health or housing codes. Where violations are found, the agencies can often issue administrative orders requiring the property owner to address the problems. If property owners refuse to comply with administrative orders, some agencies can seek court

¹³⁵ The Marion County Health Department offers free lead tests on Thursday afternoons from 12 – 5 PM at its central office at 3838 N. Rural St., Indianapolis, or you can call them at 317-221-2155 to arrange a test. See <http://www.mchd.com/newlead.htm> for more information.

¹³⁶ See, for example, the Ft. Wayne-Allen County Health Department website, http://www.fw-ac-deptofhealth.com/Lead_Prevention.htm. The Marion County Health Department employs a Lead Education Specialist, available to make presentations on lead poisoning prevention (317-221-2209).

¹³⁷ Although many health care professionals routinely screen young children, others are either not aware of the likelihood of lead poisoning or believe, probably incorrectly, that it is no longer a problem in their community.

¹³⁸ See [410 IAC 1-2.3-87](#).

orders to comply.¹³⁹ In extreme cases, agencies can declare property uninhabitable and require it be vacated. In 2004, for example, the Vigo County Health Department “redtagged” a rental property in Terre Haute (declared it unfit for habitation) after the landlord refused to remediate lead hazards and indicated he intended to sell the property.¹⁴⁰ A systematic program of housing inspections and code enforcement, such as has been undertaken by the Marion County Health Department, is a very proactive approach to preventing lead poisoning—not just responding to it after a child has already been poisoned.

Local Health Departments can also monitor compliance with disclosure requirements, use of prohibited and dangerous paint removal techniques, and other requirements and make referrals to IDEM and ISDH.

Local agencies are generally overworked, but will respond to complaints of unsafe housing conditions.

2. Community Action Agencies

Community Action Agencies also contribute to reducing the threat of lead poisoning by assisting citizens with weatherization projects. One of the most effective measures to reduce lead hazards is the replacement of old, deteriorating windows, window frames and doors.

B. What Does State Government Do?

In Indiana, two state agencies have specific responsibilities relating to lead hazards and lead poisoned children: the Indiana Department of Environmental Management and the Indiana State Department of Health. The Attorney General has general authority to enforce Indiana laws and pursue cases where there is risk to the public health or environment.

1. Indiana Department of Environmental Management

IDEM implements the licensing program for lead abatement professionals on behalf of EPA.¹⁴¹ Complaints that contractors in abatement projects are not following requirements for proper work practices or that unlicensed persons are doing abatement activities may be filed through IDEM’s [Pollution Complaint Clearinghouse](#) or directly with the Compliance Branch of the Office of Air Quality.

¹³⁹ [IC 16-20-1-23 and 25](#).

¹⁴⁰ See http://www.ikecoalition.org/LSITF_Newsletter/LSITF_Newsletter_Dec_2004.htm#Habitation for more information about this proactive action.

¹⁴¹ [IC 13-17-14](#); [326 IAC 23](#); <http://www.in.gov/idem/air/compliance/#B>.

IDEM also has the responsibility to seek an injunction to restrain activities that are introducing contaminants into the environment in a way that creates a substantial and imminent danger to the public health.¹⁴²

2. [Indiana State Department of Health](#)

The ISDH has substantial responsibilities, both regulatory and non-regulatory to reduce childhood lead poisoning in Indiana. ISDH is the agency in charge of developing and overseeing implementation of [Indiana's Childhood Lead Poisoning Prevention Plan](#).¹⁴³ The types of activities that make up ISDH's childhood lead poisoning prevention program include the following:

- Determining how many of Indiana's young children have elevated blood lead levels;
- Providing consultation and education to the medical provider network that screens for lead poisoning throughout Indiana;
- Analyzing blood samples or assisting regional lab sites to receive blood samples for lead poisoning;
- Developing and maintaining a surveillance system to track screening, case management and environmental investigation activities for Indiana children;
- Providing consultation to local Health Departments regarding medical case follow-up and environmental inspections conducted to reduce the incidence of lead poisoning; and
- Coordinating lead exposure detection activities with local Health Departments.¹⁴⁴

ISDH regulations require local Health Departments to monitor children with blood lead levels ≥ 10 $\mu\text{g}/\text{dL}$, refer them for case management and environmental assessment, and assure follow-up blood testing.¹⁴⁵ The regulations also require that physicians report cases of childhood lead poisoning and labs report any blood test ≥ 10 $\mu\text{g}/\text{dL}$.¹⁴⁶ The agency is currently developing a more comprehensive regulatory program to address the requirements of [Senate Bill 538](#), passed in 2005, which requires more and better data collection and reporting.

3. [The Indiana Attorney General](#)

The Indiana Attorney General has authority under [IC 13-30](#) to bring an action for declaratory and equitable relief in the name of the state of Indiana for the protection of the environment of Indiana from significant pollution, impairment, or destruction. This authority can be exercised independent of IDEM.

¹⁴² [IC 13-14-10-1](#).

¹⁴³ See <http://www.in.gov/isdh/programs/lead/pdf/FinalChildhoodLeadPoisonElimPlan.pdf>.

¹⁴⁴ See <http://www.in.gov/isdh/programs/lead/index.htm> for detailed information about ISDH's activities.

¹⁴⁵ [410 IAC 1-2.3-87](#).

¹⁴⁶ [410 IAC 1-2.3-47 and 48](#).

4. [Indiana Family and Social Services Administration](#)

This agency assists local Community Action Agencies with funding and technical assistance for weatherization projects.¹⁴⁷

5. [Indiana Housing and Community Development Authority](#)

This agency uses federal and state funds to assist with the rehabilitation of affordable housing through a variety of programs. Because the programs are funded largely by HUD, lead paint inspection and remediation requirements apply.¹⁴⁸

C. [What Does the Federal Government Do?](#)

The key federal agencies involved in activities relating to lead hazards and lead poisoning are the Centers for Disease Control and Prevention (CDC), the Department of Housing and Urban Development (HUD), and the Environmental Protection Agency (EPA).

1. [CDC](#)

Through the [National Center for Environmental Health](#), the CDC provides leadership, funding and research on lead poisoning issues, including the following:

- CDC provides funding to states, cities, and counties for primary prevention, and provides additional funding to several states for surveillance. These programs ensure that screening, lead-hazard abatement, new legislation, and other prevention mechanisms occur throughout the country;
- CDC issues guidance for the prevention of childhood lead poisoning;
- CDC has established a national surveillance system for children with elevated blood lead levels;
- In Indiana, CDC has funded development of [Indiana's Childhood Lead Poisoning Prevention Plan](#) and various activities to implement provisions of the Plan.

2. [HUD](#)

The [Office of Healthy Homes and Lead Hazard Control](#) is the office within HUD with responsibility for lead issues.¹⁴⁹ HUD established this office after passage of the

¹⁴⁷ See <http://www.in.gov/fssa/families/housing/cap.html>.

¹⁴⁸ See <http://www.in.gov/ihfa/comdev/comp/lead/lead.htm>.

[Residential Lead-Based Paint Hazard Reduction Act of 1992](#) to bring together health and housing professionals in a concerted effort to eliminate lead-based paint hazards in America's privately-owned and low-income housing. The core activities of the office include:

- Operation of a grant program (the HUD Lead-Based Paint Hazard Control Program) for state and local governments to develop and implement cost effective methods for the inspection and reduction of lead-based paint hazards in private owner-occupied and rental housing for low and moderate income families;
- Operation of a Healthy Homes program to protect children and their families from health and safety hazards in the home by focusing on public education and research and demonstrating effective assessment and intervention methods;
- Development of lead-based paint regulations, guidelines, and policies that ensure that buyers and tenants of housing have the information they need to protect their children from lead-based paint hazards, and reduce lead-based paint hazards in federally assisted and federally owned housing;
- Provision of technical assistance to HUD Field Offices, Program Offices, housing authorities, nonprofit housing providers, local and state agencies, other federal agencies, housing developers, inspectors, real estate professionals, contractors and financiers, and public health authorities;
- Evaluation of the hazard reduction methods used in the grant program to measure their effectiveness, cost and safety;
- Maintenance of a community outreach program focused on disseminating program information via print and broadcast media, conferences and exhibits, the Internet, and fact sheets and brochures;
- Building of capacity at the state, local and private-sector levels to inspect and abate lead-based paint hazards;
- Creation of liaisons with state and local governments and the private sector regarding lead hazard reduction issues; and
- Enforcement of HUD's Lead Paint Disclosure Regulations.

The grant program focuses on making homes safe from lead hazards. Activities eligible for grant funding include:

¹⁴⁹ See <http://www.hud.gov/offices/lead/>. The Office also works on other healthy homes issues, such as mold and code compliance.

- Inspections and risk assessments to identify lead-based paint risks;
- Blood testing of children prior to and following lead hazard control work;
- Lead hazard control work (this includes cleaning, interim controls, and hazard abatement);
- Temporary relocation of families during hazard control activities;
- Training for workers and supervisors;
- Training on lead safe maintenance practices for residents and others working in low-income housing; and
- Community awareness or education programs on lead hazard control and lead poisoning prevention.

3. EPA

EPA's [Lead Awareness Program](#) works to protect human health and the environment against the dangers of lead by developing regulations, conducting research, and designing and distributing educational outreach efforts and materials. EPA's programs also address lead in drinking water and in emissions from motor vehicles and industrial sources, in addition to lead-based hazards. EPA has developed a lead-based paint risk assessment, inspection and abatement training and certification program. The program allows states, such as Indiana, to seek authorization to implement a program in lieu of the federal program. EPA administers the program in all non-authorized states, territories, and tribal lands. EPA is responsible for establishing standards for the identification of lead hazards in paint, dust and soil. EPA also pursues violations of abatement and disclosure requirements. In January 2005, EPA issued proposed rules for training, certification and work practices for renovation and remodeling activities.¹⁵⁰

4. Consumer Product Safety Commission

The [Consumer Product Safety Commission](#) works to reduce the risk of injuries and deaths associated with consumer products by:

- developing voluntary standards with industry;
- issuing and enforcing mandatory standards or banning consumer products if no feasible standard would adequately protect the public;
- obtaining the recall of products or arranging for their repair;
- conducting research on potential product hazards; and
- informing and educating consumers through the media, state and local governments, private organizations, and by responding to consumer inquiries

¹⁵⁰ The proposed regulations can be found at <http://www.epa.gov/oppt/lead/pubs/lrrp-nprm-12-29-05.pdf>. These rules are required by [15 USC 2682\(c\)\(3\)](#) to address “renovation or remodeling activities in target housing, public buildings constructed before 1978, and commercial buildings that create lead-based paint hazards.”

In 1978, the Consumer Product Safety Commission issued regulations that banned the use of residential paint containing more than 0.06% lead and has been active in issuing warnings and recalls of products that pose a risk of lead poisoning to children.

5. *The Food and Drug Administration*

The Food and Drug Administration works to assure the safety and efficacy of drugs, food, cosmetics and certain other products. It issues guidance and recalls where products pose a danger to the public.

Finding and Treating the Lead Poisoned Child

A. Overview

We hope it has become clear to readers how important it is to prevent any child from becoming lead poisoned. Aggressive implementation of primary prevention measures is essential to meet this goal. Unfortunately, because primary prevention is not fully implemented, we must continue to use secondary prevention strategies to find and treat children at risk.

Because the health implications of lead poisoning to young children are so devastating, and so preventable, it is essential that exposure to lead and elevated blood lead levels be proactively identified. There are two main approaches: (1) identify lead hazards in homes and other child-occupied facilities and (2) identify children with elevated blood lead levels.

1. Identifying and Fixing High Risk Properties

Proactively identifying and fixing high risk housing is a key primary prevention strategy, but it is also an important way to identify children who may already have high blood lead levels. If housing is federally owned or subsidized in some way, HUD regulations require that it be inspected for lead hazards, and treated either with abatement or interim controls if hazards are found. For private housing, however, there is no federal or Indiana state requirement that housing or other child-occupied facilities¹⁵¹ be inspected. Further, there is no federal or Indiana state requirement that housing that has been identified as high risk be abated, even when a child living there has elevated blood lead levels.¹⁵² ISDH regulations do require that local Health Departments monitor children who have had a blood lead test result ≥ 10 $\mu\text{g/dL}$, provide case management, environmental assessment, and follow-up blood testing.¹⁵³ There are two primary ways privately owned housing is inspected: (1) through the local health Department, either because of a general complaint about conditions such as peeling paint that may violate the health or housing code or because a child has been identified

¹⁵¹ Such as daycare centers, for example.

¹⁵² Many local Health Departments undertake an inspection and require property owners to eliminate lead hazards when a lead poisoned child has been identified at that address; some, however, lack clear authority to require remediation.

¹⁵³ [410 IAC 1-2.3-87](#) states: “Local health officers shall ensure the monitoring of children, equal to or less than six (6) years of age, who have been reported to have a venous blood lead level of greater than ten (10) :g per deciliter. Monitoring shall include referrals for case management if not already accomplished and environmental assessment. Additional guidance may be found in Center for Disease Control and Prevention publication Screening Young Children for Lead Poisoning: Guidance for State and Local Public Health Officials, November 1997.”

as lead poisoned, and (2) at the time of sale or rental of the property if the seller or lessee asks for a lead paint inspection before closing the deal or signing the lease.¹⁵⁴

2. Identifying Children with Elevated Blood Lead Levels

Some states require that all children have a blood lead test or tests before age 6, but Indiana does not have this requirement.¹⁵⁵ Some physicians in Indiana routinely test their young patients for lead poisoning; others do not.¹⁵⁶ Routine testing is essential, because symptoms of lead poisoning can be subtle and by the time they are more prominent, significant permanent damage may have been done to the child's developing brain. CDC guidelines state that zip codes where 27% or more of the housing is pre-1950 should be considered high risk neighborhoods and recommend that all children be screened.¹⁵⁷

Children who are enrolled in Medicaid must be screened once before their first birthday and again at age 2.¹⁵⁸ As a group, Medicaid-eligible children are considered high risk for lead poisoning. In Indiana in 2004-5, approximately 30% of the children under 7 enrolled in Medicaid had been tested for lead at least once in their life.¹⁵⁹ It is a key goal of [Indiana's Childhood Lead Poisoning Prevention Plan](#) to increase the number of high risk children who receive blood screening.

B. What Happens After A Child Has Been Identified with an Elevated Blood Lead Level?

Indiana law requires that the results of any blood lead test be reported to the Indiana State Department of Health within a week of the test.¹⁶⁰ In all cases of a blood lead level exceeding 10 µg/dL, the immediate concern should be to eliminate the source of exposure. In some cases, this may mean removing the child from his or her home. ISDH's guidance indicates that any test over 10 µg/dL should result in a referral to the local Health Department for assistance, a confirmatory blood test, a medical history and physical examination of the child, lead poisoning education to the family, a risk

¹⁵⁴ Home buyers (and banks) are becoming much more accustomed to asking for radon tests as part of the negotiation for a home sale. Similar awareness about the value of a pre-sale lead inspection would go a long way to identifying high risk housing and, inevitably, lead to more abatement and interim controls.

¹⁵⁵ See, for example, [105 Code of Massachusetts Regulations 460.050](#), which requires a lead blood screening test for all children between 9 and 12 months (when children are beginning to crawl and walk) and between 2 and 3 years.

¹⁵⁶ There are some physicians who believe that lead poisoning is no longer a danger to children since lead paint was banned in 1978.

¹⁵⁷ CDC's guidance, "Screening Young Children for Lead Poisoning," can be found at <http://www.cdc.gov/nceh/lead/guide/guide97.htm>.

¹⁵⁸ The Early and Periodic Screening and Diagnostic Testing program requires that all children receive a screening blood lead test at 12 months and 24 months of age. Children between the ages of 36 months and 72 months of age must receive a screening blood lead test if they have not been previously screened for lead poisoning. See http://www.cms.hhs.gov/MedicaidEarlyPeriodicScrn/02_Benefits.asp#TopOfPage. In Indiana in 2003, there were 478,000 children enrolled in Medicaid, approximately 28% of Indiana's children.

¹⁵⁹ Data provided by Indiana State Department of Health.

¹⁶⁰ [IC 16-41-39-4-3](#).

assessment to identify the source of the exposure, and measures to reduce the exposure.

A blood lead level over 45 µg/dL is considered a medical emergency. The child should be seen as soon as possible by a physician so a course of treatment can be determined.

Conclusion

We hope this manual has been a helpful introduction to the important issue of lead poisoning and lead paint in Indiana, and that it will continue to be a useful resource. We welcome corrections, additions, updates and suggestions for how to make the book more useful. Please contact us at mccabe@ikecoalition.org or (317) 902-3610.