

**NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**Notice of Adoption of Amendments
to Articles 11 and 173 of the New York City Health Code**

At the July 21, 2022 meeting of the New York City Board of Health (“Board”), the Department of Health and Mental Hygiene (“Department”) presented a notice of intention (“NOI”) to amend Articles 11 and 173 of the New York City Health Code (“Health Code”). The Board approved the NOI as presented for publication. In compliance with section 1043(b) of the New York City Charter (“the Charter”) and pursuant to the authority granted to the Board by section 558 of the Charter, the NOI was published in the New York City Record on July 29, 2022. A public hearing was held on August 29, 2022; no one testified at the hearing. Two written comments were received, one in favor of the proposed amendments and one opposed. After consideration of the comments, for the reasons noted below, no changes have been made to the proposed amendments. At its meeting on October 25, 2022, the Board adopted the following resolutions.

Statement of Basis and Purpose

New York City has been on the forefront of action to protect New Yorkers from lead paint hazards since 1960. In response to lead poisoning prevention provisions recently enacted by the City Council, as well as to formally adopt the Department’s high standards of public health practice, the Board has amended Article 173 of the Health Code twice in the past three years. In 2019, the Board adopted significant new safeguards for children that, among other things, lowered the childhood blood lead level requiring mandatory Department investigations and the lead dust action level.¹ And in 2021, the Board amended Article 173 to make explicit that the Department’s investigations in response to reports of children with elevated blood lead levels (“EBLLs”) include inspection of any location where the child regularly spends significant time, to clarify that the Department has the authority to order abatement or remediation of lead-based paint and dust in locations occupied by children under age 18, and to extend the unsafe lead paint hazard standard to childcare programs attended by a child with an EBLL.²

Among the recent amendments to the Administrative Code on lead poisoning prevention was the enactment of section 17-912, regarding setting the childhood blood lead reference value (“reference value”) at 5 micrograms per deciliter (mcg/dL) as the action level for Department investigations.³ This reference value was based on the 97.5th percentile of the blood lead distribution in U.S. children aged 1–5 years from National Health and Nutrition Examination Survey (NHANES) data, and identifies children with higher levels of lead in their blood compared to most children. Anticipating that the reference value would continue to decline as fewer children are exposed to lead hazards, Administrative Code section 17-912(a) requires the Department to either adopt any new reference value as its action level whenever the federal Centers for Disease Control and Prevention (“CDC”) defines a lower blood lead reference level, or submit a report to the Mayor and Speaker of the City Council detailing the reasons the new reference value should not be adopted as the threshold for investigations.

¹ New York City Record, June 19, 2019, at 3049 *et seq.*

² New York City Record, September 28, 2021, at 6627 *et seq.*

³ Local Law No. 66 of 2019.

In October 2021, the CDC lowered the reference value in children to 3.5 mcg/dL.⁴ To continue advancing protections for children from lead exposure, the Board is amending Article 173 to lower the blood lead level for mandatory Department investigations to 3.5 mcg/dL, and amending Article 11 to adopt 3.5 mcg/dL as the level for mandated reporting and inclusion in the Children’s Blood Lead Registry. These amendments also respond to a petition to the Board submitted pursuant to Health Code Article 9 asking for such a change.

In addition, the NYC Department of Housing Preservation and Development (HPD) has adopted regulations described by Administrative Code section 27-2056.2(7)(b) to redefine “lead-based paint” as that containing a lead content of 0.5 milligrams per square centimeter (mg/cm²) or greater.⁵ The HPD regulations also now presume that, based on the technical specifications of the XRF machines, an inconclusive XRF result at 0.5 mg/cm² indicates the presence of lead paint at this level, unless shown otherwise by laboratory analysis. With this adoption, the Health Code definition of “unsafe lead paint” at 0.5 mg/cm², which had been adopted to enable the Department to order abatement of non-intact paint at this lower level until HPD was able to adopt the more protective standard, is no longer needed. The Board therefore is repealing the definitions of “unsafe lead paint” and “unsafe lead paint hazard” from Health Code section 173.14(b) and amending the definition of “lead-based paint” to provide for this new lower standard. The now-outdated portions of the definition of “lead-based paint” that refer to Administrative Code section 27-2056.2(7)(b) are being deleted. All references to “unsafe lead paint” and “unsafe lead paint hazards” are also being removed from the Health Code because there is also no longer a need for them. Some of these amendments were not noted in the proposed NOI as an administrative oversight, but are included here to ensure consistency throughout Article 173.

The Board received two comments related to these proposed changes. One commentor was supportive of lowering the reference level to 3.5 mcg/dL. The second commentor opposed this change because the reference level is “not health-based and is not a regulatory standard.” The new reference level is population-based, as noted above, and it is true that the CDC has not mandated it as the threshold for intervention nationally. There is no identified threshold or safe level of lead in blood, however, and the Board’s goal is to continually reduce blood lead concentrations of the city’s children. Further, as noted above, Administrative Code section 17-912 requires the Board to consider a lower blood reference level when the CDC lowers the federal reference value, which occurred in October 2021. For these reasons, no changes have been made to the Health Code amendments concerning lowering reference level. The second commentor also opposed redefining “lead-based paint” as that containing a lead content of 0.5 mg/cm² or greater. No changes to the amendments were made based on this comment.

Statutory Authority

These amendments to the Health Code are promulgated pursuant to Sections 558 and 1043 of the New York City Charter. Section 558 empowers the Board to amend the Health Code and to include in the Health Code all matters to which the authority of the Department extends. Section 1043 grants the Department rulemaking authority.

The proposal is as follows:

New material is underlined.

⁴ CDC, *Update of the Blood Lead Reference Value – United States, 2021*, MMWR, October 29, 2021, available online at <https://www.cdc.gov/mmwr/volumes/70/wr/mm7043a4.htm>.

⁵ New York City Record, October 13, 2021, at 6956 *et seq.*, eff. December 1, 2021.

[Deleted material is in brackets.]

Asterisks (***) indicate unamended text.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this Department, unless otherwise specified or unless the context clearly indicates otherwise.

RESOLVED, that subdivision (a) of section 11.03 of Article 11 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, is amended to read as follows:

§ 11.03 Diseases and conditions of public health interest that are reportable.

(a) Cases and carriers affected with any of the following diseases and conditions of public health interest, and persons who at the time of their death were apparently so affected, shall be reported to the Department as specified in this article:

Blood lead level of [five] three and a half micrograms per deciliter or higher (see also section 11.09(a) of this Code)

RESOLVED, that subdivision (a) of section 11.09 of Article 11 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, is amended to read as follows:

- (a) In addition to the reports of blood lead levels made pursuant to 24 RCNY Health Code § 11.03, results of blood lead analyses that are less than [five] three and a half micrograms per deciliter for any resident of the City of New York shall be reported as follows:
- (1) Except as provided in Paragraph (2), clinical laboratories shall report blood lead test results that are less than [five] three and a half micrograms per deciliter to the Department.
 - (2) A clinical laboratory that reports blood lead test results less than [five] three and a half micrograms per deciliter electronically to the New York State Department of Health shall not be required to make any additional report to the Department of such test results.
 - (3) A person or entity who orders or performs blood lead tests but does not submit the specimen to a clinical laboratory for analysis shall report results of less than [five] three and a half micrograms per deciliter to the Department.

RESOLVED, that paragraph (4) of subdivision (a) of section 173.13 of Article 173 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, is amended to read as follows:

- (4) *Investigations.* Whenever a report has been made to the Department of a child under 18 years of age with a blood lead level of [five (5)] three and a half (3.5) micrograms per deciliter or higher, the Department shall conduct such investigation as may be necessary to identify potential sources of the elevated blood lead level, including but not limited to, an inspection of the dwelling unit where such child resides and any supplemental address of that child.

RESOLVED, that paragraphs (2) and (3) of subdivision (d) of section 173.13 of Article 173 of the

New York City Health Code, set forth in Title 24 of the Rules of the City of New York, are amended to read as follows:

- (2) *In the dwelling of a child with a blood lead level of [five (5)] three and a half (3.5) micrograms per deciliter or greater.* When the Department finds that the interior of any dwelling of a child under 18 years of age with a blood lead level of [five (5)] three and a half (3.5) micrograms per deciliter or higher has a lead-based paint hazard because of its condition, location or accessibility to children, the Department shall order the abatement of any such condition in a manner and under such safety conditions as it may specify[; in addition, until HPD adopts regulations described by paragraph (b) of subdivision (7) of section 27-2056.2 of the Administrative Code, the Department is authorized to order abatement when an unsafe lead paint hazard is present in such dwelling].
- (3) *Objections to Department orders.* An owner or other person to whom an order issued pursuant to this subdivision is directed shall notify the Department that he or she objects to such order no later than three (3) days after service of the order. In deciding whether objections to an order issued pursuant to 24 RCNY Health Code § 173.13(d)(2) have merit, the Department may rely on the results of its lead-based paint [or unsafe lead paint] sampling, provided such results are obtained in accordance with the methodology identified within the definitions of this Code and the Department has a reasonable belief that such reliance will be more protective of the health of a child with an elevated blood lead level.

RESOLVED, that section 173.14 of Article 173 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, is amended to read as follows:

§ 173.14 Safety standards for lead-based [and unsafe lead] paint abatement and remediation, and work that disturbs lead-based [or unsafe lead] paint.

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- (a) *Purpose, scope and applicability.* This section establishes work practices and safety standards for (1) abatement and other reduction of lead-based [and unsafe lead paint] hazards; (2) other work that disturbs surfaces covered with lead-based paint, or paint of unknown lead content; and (3) the minimum qualifications of persons who conduct such activities, in premises where children younger than six years of age reside, receive child care services, or attend prekindergarten or kindergarten classes. This section is intended to reduce the exposure of such children to the lead-based [and unsafe lead] paint hazards associated with such work.
- (b) *Definitions.* When used in this Article, or in § 43.23 or § 47.63 of this Code, the following terms shall have the following meanings:

Abatement. "Abatement" shall mean any set of measures designed to permanently eliminate lead-based paint[, unsafe lead paint,] or lead-based paint hazards[, or unsafe lead paint hazards]. Abatement includes: (i) the removal of such hazards, the permanent enclosure or encapsulation of such paint, and the replacement of components or fixtures painted with such paint; and (ii) all preparation, cleanup, disposal and post-abatement clearance testing associated with such measures. Abatement shall not include renovation, remodeling, landscaping or other activities, when such activities are not designed to permanently eliminate lead-based [or unsafe lead] paint hazards, but, instead, are designed to repair, restore, or remodel a given structure or dwelling, even though these activities may incidentally result in a reduction or elimination of lead-based paint [or unsafe lead paint] hazards. Furthermore, abatement shall not include interim controls, operations and maintenance activities, or other measures and activities

designed to temporarily, but not permanently, reduce lead-based [or unsafe lead] paint hazards.

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Encapsulation. "Encapsulation" shall mean the application of a covering or coating that acts as a barrier between the lead-based [or unsafe lead] paint and the environment and that relies for its durability on adhesion between the encapsulant and the painted surface, and on the integrity of the existing bonds between paint layers and between the paint and the substrate. Encapsulation may be used as a method of abatement if it is designed and performed so as to be permanent. Only encapsulants approved by the New York State Department of Health, or by another federal or state agency or jurisdiction which the Department or HPD has designated as acceptable may be used for performing encapsulation.

Enclosure. "Enclosure" shall mean the use of rigid, durable construction materials that are mechanically fastened to the substrate in order to act as a barrier between lead-based [or unsafe lead] paint and the environment.

Lead-based paint. "Lead-based paint" for the purpose of this Code, shall mean paint or other similar surface coating material containing lead in a concentration of [1.0 milligram] 0.5 milligrams per square centimeter (mg/cm²) or greater as determined by laboratory analysis, or by an x-ray fluorescence (XRF) analyzer[, except that, upon promulgation by HPD of the rule described by Paragraph (b) of subdivision (7) of section 27-2056.2 of Administrative Code, "lead-based paint" shall mean paint or other similar surface coating material containing 0.5 mg/cm² or greater as determined by laboratory analysis, or by XRF analyzer]. If an XRF analyzer is used, readings shall be corrected for substrate bias when necessary as specified by the Performance Characteristic Sheets (PCS) published by the United States Environmental Protection Agency (EPA) for the specific XRF instrument used. XRF readings shall be classified as positive, negative or inconclusive in accordance with the United States Department of Housing and Urban Development (HUD) "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing" (July 2012) or any successor guidelines issued by HUD, and the PCS published by the EPA and HUD for the specific XRF instrument used. XRF results which fall within the inconclusive zone, as determined by the PCS, shall be [confirmed by] classified as positive unless laboratory analysis of paint chips[, show them to be negative. Reports of laboratory results shall be reported in mg/cm² and the measure of such laboratory analysis shall be definitive. If laboratory analysis is used to determine lead content, results shall be reported in mg/cm². Where the surface area of a paint chip sample cannot be accurately measured or if an accurately measured paint chip sample cannot be removed, laboratory analysis may be reported in percent by weight. In such case, lead-based paint shall mean any paint or other similar surface coating material containing more than [0.5% of metallic lead, based on the non-volatile content of the paint or other similar surface coating material, except that, upon promulgation by HPD of the rule described by Paragraph (b) of Subdivision (7) of Section 27-2056.2 of the Administrative Code, lead-based paint shall mean paint or other similar surface-coating material containing more than] 0.25% of metallic lead, based on the non-volatile content of the paint or other similar surface-coating material. In the absence of a PCS for a specific XRF instrument or a particular function of such instrument, substrate correction, classification of XRF readings, and determinations of inconclusive readings shall be performed in accordance with the manufacturer's instructions for the specific XRF instrument used.

Remediation. "Remediation" shall mean the reduction or elimination of a lead-based [or unsafe lead] paint hazard through the wet scraping and repainting, removal, encapsulation, enclosure, or replacement of lead-based paint, or other method approved by the Department.

Removal. "Removal" shall mean a method of abatement that completely eliminates lead-based [or unsafe lead] paint from surfaces.

Replacement. "Replacement" shall mean a strategy or method of abatement that entails the removal of building components that have surfaces coated with lead-based [or unsafe lead] paint and the installation of new components free of lead-based or unsafe lead paint.

Supplemental address. "Supplemental address" shall mean any location where a child with a blood lead level equal to or in excess of [five (5)] three and a half (3.5) micrograms per deciliter spends five (5) or more hours per week.

[Unsafe lead paint. "Unsafe lead paint" for the purposes of this Code shall mean paint with a concentration of lead content equal to or greater than 0.5 mg/cm² and less than or equal to 0.9 mg/cm² or a metallic lead content of 0.25% or greater, as determined by laboratory analysis or by an XRF analyzer. XRF readings shall be classified as positive or negative in accordance with the manufacturer's instructions and, in the absence of a PCS for a specific XRF instrument or a particular function of such instrument, substrate correction, classification of XRF readings, and determinations of inconclusive readings shall be performed in accordance with the manufacturer's instructions for the specific XRF instrument used. If laboratory analysis is used to determine lead content, results shall be reported in milligrams of lead per square centimeter. Where the surface area of a paint chip sample cannot be accurately measured or if an accurately measured paint chip sample cannot be removed, a laboratory analysis may be reported in percent by weight. In such cases, lead-based paint shall mean any paint or other similar surface-coating material containing more than 0.25% of metallic lead, based on the non-volatile content of the paint or other similar surface-coating material.

Unsafe lead paint hazard. "Unsafe lead paint hazard" shall mean any condition in a dwelling, dwelling unit, or, on or after October 17, 2022, any supplemental address of a child of applicable age that is regulated by 24 RCNY Health Code Article 43 or 24 RCNY Health Code Article 47, that causes exposure to lead from unsafe lead paint that is peeling or present on chewable surfaces, deteriorated subsurfaces, friction surfaces, or impact surfaces that could result in adverse human health effects.]

Work. "Work" shall mean any activity that disturbs paint in accordance with Article 14 of subchapter 2 of Title 27 of the Administrative Code or as otherwise ordered by the Department to remediate lead-based [or unsafe lead] paint hazards.

Work area. "Work area" shall mean that part of a building where lead-based paint[, unsafe lead paint,] or paint of unknown lead content is being disturbed.

- (c) *Administrative requirements.* [All administrative requirements of this subdivision that apply to lead-based paint or lead-based paint hazards shall also apply to unsafe lead paint and unsafe lead paint hazards, respectively.]

- (d) *Work methods and occupant relocation.* [All administrative requirements of this subdivision that apply to lead-based paint or lead-based paint hazards shall also apply to unsafe lead paint and unsafe lead paint

hazards, respectively.]

- (e) *Occupant protection.* [All requirements of this subdivision that apply to lead-based paint or lead-based paint hazards shall also apply to unsafe lead paint and unsafe lead paint hazards, respectively.]

- (f) *Investigation of unsafe lead work practices by the Department.*

- (2) *Scope of authority.* Such inspection may include but not be limited to premises where abatement or remediation of lead-based paint[or unsafe lead] hazards is being conducted, where any work which may disturb lead-based paint[, unsafe lead paint,] or paint of unknown lead content is being conducted, or which is the subject of a complaint to the Department pursuant to § 17-185 of the Administrative Code, and any areas affected by the emission or release of leaded dust or debris.

- (g) *Declaration pursuant to Administrative Code § 17-145.* The existence of a lead-based paint condition[, unsafe lead paint condition,] or a lead-based paint hazard[, or unsafe lead paint hazard] pursuant to 24 RCNY Health Code § 173.13, or a failure to comply with this section is hereby declared to constitute a public nuisance and a condition dangerous to life and health, pursuant to § 17-145 of the Administrative Code. Every person obligated to comply with the provisions of this section or 24 RCNY Health Code § 173.13 is hereby ordered to abate or remediate such nuisance by complying with any order or direction issued by the Department.